

Transcending Human Rights Instrumentalism

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July 2017

A thesis submitted for the degree of Doctor of Philosophy of
The Australian National University

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DECLARATION

I hereby declare that the present thesis is entirely my own original work and has not been submitted for any other degree at any other educational institution. All sources of information used in this thesis are indicated and due acknowledgment has been given to the work of others.

Signed:

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ACKNOWLEDGEMENTS

I have been privileged to have had remarkable mentorship in completing this thesis. I deeply appreciate the work of my supervisory panel, Professor Hilary Charlesworth (ANU), Dr Benjamin Authers (ANU) and Professor Andrew Byrnes (UNSW). Hilary, thank you for your wisdom, generous guidance and tireless editing of my drafts from the very first sketch. Your encouragements and faith in me raised me up, and I feel extremely fortunate to be your student. Ben, thank you for your sobering advice on this work and beyond, as well as your friendship and understanding. Andrew, thank you for your insights and the specialist knowledge that you have generously shared with me. I am grateful to all my panel members for their careful edits of various drafts of this work. I acknowledge that any mistake and error in this work is mine.

I sincerely appreciate to the research participants from Australia and Mongolia, who generously shared and patiently explained their stories. Your endeavours and rich world-views were deeply humbling and eye-opening. Discussions with Professors Gerard Quinn, John Braithwaite, Peter Drahos, Phillip Alston, Ronald McCallum, Sally Engle Merry and Valerie Braithwaite, Associate Professor Miranda Forsyth and Lee Ann Basser, Dr Emma Larking, Mr Graeme Innes and Ms Maria Virginia Brás Gomes have been illuminating. Thank you, all.

I am honoured to acknowledge that this work is funded by the Australian Research Council (ARC)'s Laureate Fellowship Project 'Strengthening the International Human Rights System: Rights, Regulation and Ritualism' held by Professor Hilary Charlesworth. Also, an International Postgraduate Research Scholarship (ANU) and a Civil Society Scholar Award (Open Society Foundation) supported this research financially. I am grateful for the assistances given by the ANU Research Skills and Training Unit, the ANU Sports and the ANU library's Off-campus service. Ms Candida Spence from the ANU library persistently helped me in formatting the thesis and Ms Maxine McArthur from the School of History and Language helpfully edited the early drafts of some chapters.

My colleagues at the National Human Rights Commission of Mongolia nurtured my interests and provided an excellent companionship. The National Legal Institute of Mongolia provided me a work space in the final stage of the research. My very special

thanks to Professors Brian Burdekin (Lund University), Li Narangoa (ANU) and John Tobin (University of Melbourne) for their continued support over the years. I am also grateful to my two special friends, Sanzhuan Guo and Meg Brodie, whose support and encouragement were important in embarking on this journey.

I have thoroughly enjoyed the stimulating and collegial environment of the ANU School of Regulation and Global Governance (RegNet). I am thankful for friendship and collegiality of Adérito Soares, Cheryl White, Christoph Sperfeldt, Cynthia Banham, Hisako Yamauchi, Imelda Dienla, Jacky Parry, Julia Wee, Kate Henne, Kristina Simion, Libby Salmon, Mareike Reidel, Marie-Eve Loiselle, Meredith Edelman, Paulina Piira, Phil Baker, Robyn Holder, Savitri Gurung, Seung Hung Hong, Shane Chalmers, Suza Akila, Therese Pearce Laanela and Wenting Cheng. Thanks also to Ariun-Erdene Bayarjargal, Fleur Adcock and Undarga Sandagsuren for sharing this experience.

I am very grateful for warmth and support of my family. Without love and support of my parents, Ganbat Osor and Adiya Jigjidsuren, I would not be who and where I am now. My sisters have been incredible sources of support. This thesis would not be made possible without the unwavering support, understanding and love of my husband, Tumurbaatar Nergui. I cannot thank you enough, my love! Our son, Tuguldur, has filled my soul with joy and happiness. I apologise to my dear son for the years that mommy has had less time for you, while you had to endure sea changes moving back and forth between Australia and Mongolia. I am grateful that you nevertheless grew into a happy boy with a great sense of humour.

My journey started from a rural town in eastern Mongolia. There, my grandparents, Jigjidsuren Hujirangaa and Dolgor Sanrav, raised me with unmatched love, and sowed the seeds of confidence and curiosity within me. Because of these, I dared to embark on this journey. Thank you eternally, grandpa and grandma! This thesis is dedicated to my grandparents.

ABSTRACT

Whether human rights treaties produce an impact on the ground is a highly contested question in international law. I engage in this debate in the present thesis offering a qualitative study of the implementation of the *UN Convention on the Rights of Persons with Disabilities* in Australia and Mongolia. The scholarship commonly understands human rights treaties in legalistic terms. Treaty outcomes are measured on the basis of the direct effects of their norms. State ratification and incorporation of treaty norms in domestic legal orders are perceived as the principal ways whereby human rights treaties penetrate into and transform domestic contexts. A common prescription for better treaty implementation is to increase their coercive enforcement. I call this view human rights instrumentalism and, in this thesis, argue that it offers a limited understanding of the role that the treaties play in national arenas.

The thesis illustrates that, in the years following the adoption of the *Disabilities Convention* in 2006, vibrant legal and policy developments have taken place in the two countries studied. Those laws and policies have typically embraced the international law. Yet, when tracing their lineage, the *Convention's* effects are seen to be largely indirect to those domestic legal reforms. At the same time, the research identifies a significant non-legal impact of the *Convention*, which, regardless of the particular norms of the treaty or domestic incorporation thereof, profoundly affects the social fabric of Australia and Mongolia. The thesis argues that such an outcome emanates essentially from the symbolic or political power of the treaty, and describes the subtle ways in which the *Disabilities Convention* functions as a social symbol in the two domestic contexts.

LIST OF ABBREVIATIONS

ACT	Australian Capital Territory
ADA	<i>Americans with Disabilities Act of 1990</i> (United States of America)
AHRC	Australian Human Rights Commission
AIFO	Amici di Raoul Follereau Association
ALP	Australian Labor Party
ALRC	Australian Law Reform Commission
Auslan	Australian sign language
Australian Constitution	<i>Constitution of the Commonwealth of Australia Act 1900</i>
AWU	Association of Wheelchair Users (Mongolia)
BIC	Business Incubator Centre (Mongolia)
CAT	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i>
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination against Women</i>
CEDAW Committee	United Nations Committee on the Elimination of Discrimination against Women
CHR	United Nations Committee on Human Rights
COAG	Council of Australian Governments
CRC	<i>Convention on the Rights of the Child</i>
CRC Committee	United Nations Committee on the Rights of the Child
CRC-OP-AC	<i>Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict</i>
CRC-OP-SC	<i>Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography</i>
CRPD Committee	United Nations Committee on the Rights of Persons with Disabilities
DANIDA	Danish Development Cooperation Agency
DDA	<i>Disability Discrimination Act 1992</i> (Cth)
DIG	Disability Investment Group (Australia)
Disabilities Convention	<i>Convention on the Rights of Persons with Disabilities</i>
Disabilities Division	Division for Development of People with Disabilities of the Ministry of Population Development and Social Protection (Mongolia)

DP	Democratic Party (Mongolia)
DPI	Disabled People's International
DPO	Organisations of People with Disabilities
DPO Federation	Mongolian National Federation of the Organisations of People with Disabilities
DSA	<i>Disability Services Act 1986 (Cth)</i>
ECOSOC	United Nations Economic and Social Council
ERC	Expenditure Review Committee (Australia)
ESCR Committee	United Nations Committee on Economic, Social and Cultural Rights
EU	European Union
FIELD program	'Fostering Inclusive Development for Local Disabled' program (Mongolia)
GA	United Nations General Assembly
Genocide Convention	<i>Convention on the Prevention and Punishment of the Crime of Genocide</i>
HRC	United Nations Human Rights Council
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICCPR-OP-I	<i>Optional Protocol to the International Covenant on Civil and Political Rights</i>
ICCPR-OP-II	<i>Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty</i>
IDC	International Disability Caucus
ICED	<i>International Convention for the Protection of All Persons from Enforced Disappearance</i>
ICERD	<i>International Convention on the Elimination of Racial Discrimination</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
ICF	<i>International Classification of Impairments, Disabilities and Handicaps</i>
ICMW	<i>International Convention on the Protection of All Migrant Workers and Members of Their Families</i>
ILO	International Labour Organisation
INGOs	International non-governmental organisations
IYDP	International Year of Disabled Persons
JSCM	Joint Standing Committee on Migration (Australia)

JSCOT	Joint Standing Committee on Treaties (Australia)
LGBT	Lesbian, gay, bisexual and transgender
Mongolian Constitution	<i>Монгол Улсын Үндсэн хууль</i> [the Constitution of Mongolia] adopted on 13 January 1992
MP	Member of a Parliament
MPP	Mongolian People's Party
MPR	Mongolian People's Republic
MPRP	Mongolian People's Revolutionary Party
NABC	National Association of Blind Citizens (Mongolia)
NDCA	National Disability and Carer Alliance (Australia)
NDS	National Disability Strategy (Australia)
NDIS	National Disability Insurance Scheme (Australia)
NDIS Act	<i>National Disability Insurance Scheme Act 2013</i> (Cth)
NEDA	National Ethnic Disability Alliance (Australia)
NGOs	Non-governmental organisations
NIA	National Interest Analysis (Australia)
NHRCM	National Human Rights Commission of Mongolia
NHRIs	National Human Rights Institutions
NPDCC	National People with Disabilities and Carer Council
NSW	New South Wales (Australia)
NT	Northern Territory (Australia)
OAIC	Office of the Australian Information Commissioner
OHCHR	United Nations Office of the High Commissioner for Human Rights
OP-CAT	<i>Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i>
OP-CEDAW	<i>Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women</i>
PJCHR	Parliamentary Joint Committee on Human Rights (Australia)
PwDA	People with Disability Australia
Rome Statute	<i>Rome Statute of the International Criminal Court</i>
SCARC	The Senate Community Affairs Reference Committee (Australia)
SCHR	Parliamentary Sub-Committee on Human Rights (Mongolia)
SCSFP	Standing Committee on Security and Foreign Policy (Mongolia)
SDB	Society of Deaf and Blind (Mongolia)

Standard Rules	<i>Standard Rules on the Equalisation of Opportunities for Persons with Disabilities</i>
TLP	Transnational Legal Process
Treaties Convention	<i>Vienna Convention on the Law of Treaties</i>
Treaties Law 1993	<i>Law on International Treaties 1993</i> (Mongolia)
UDHR	<i>Universal Declaration of Human Rights</i>
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNESCO Discrimination Convention	<i>UNESCO Convention against Discrimination in Education</i>
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Emergency Fund
UNTS	United Nations Treaty Series
UPIAS	Union of Physically Impaired Against Segregation (UK)
UPR	Universal Periodic Review
US	United States
USA	United States of America
USSR	Union of Soviet Socialist Republic
VEOHRC	Victorian Equal Opportunity and Human Rights Commission (Australia)
WIPO	World Intellectual Property Organisation
WHO	World Health Organisation
WPA	<i>World Programme of Action concerning Disabled Persons</i>

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CHAPTER ONE

COMPLEXITIES OF HUMAN RIGHTS TREATIES

Human rights treaties are complex artefacts in international law. They constitute a global regime with a phenomenal expansion, yet, whether and how these treaties make a difference on the ground is the subject of much academic debate. This research examines the implementation of the *United Nations Convention on the Rights of Persons with Disabilities 2006 (Disabilities Convention or Convention)*¹ in Australia and Mongolia. By unfolding the complex realities of the domestic effects of the *Disabilities Convention*, this thesis demonstrates the limits of dominant scholarly assumptions concerning the nature and function of human rights treaties.

The present chapter is divided into three parts. Part I puts the thesis in the context of the broader academic debate. It explains some controversies in the scholarship and highlights the potential contributions of this research. Part II introduces the thesis argument. It explains the key concept of this thesis — human rights instrumentalism. In contrast to the dominant instrumentalist approach, building on regulatory theory, this research offers a contextual approach to explore the impact of human rights treaties. Part II thus explains the insights of regulatory theory informing the contextual approach, the elements of the approach and the potential that it offers to human rights scholarship. Part III discusses the research methodology and maps out the structure of the thesis.

I RESEARCH CONTEXT

Since the adoption of the *Universal Declaration of Human Rights 1948 (UDHR)*,² the international human rights regime has flourished. Today, the regime consists of eighteen treaties, including nine core treaties,³ and a complex web of political, legal and

¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) (*Disabilities Convention* or the *Convention*). When quoting directly from the research participants, I also use the abbreviation *CRPD*.

² *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

³ The nine core human rights treaties of the UN include *International Convention on the Elimination of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 1 January 1969) (*ICERD*); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (*ICCPR*); the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (*ICESCR*); *Convention on the Elimination of All Forms of Discrimination*

administrative institutions, which facilitate and monitor the implementation of these treaties.⁴ Alongside the legal and institutional expansion at the international level, domestic acceptance of human rights treaties is also widespread. For instance, every UN member state is a party to at least one treaty. According to the UN Office of the High Commissioner for Human Rights (OHCHR), 127 out of 193 UN member states have accepted more than ten human rights treaties through ratification, accession, succession or signature, whereas only 16 countries are party to less than four instruments.⁵ Despite these impressive figures, the actual outcome of these treaties is much contested.

Many scholars claim that the treaties have little relevance to or can be even harmful to domestic human rights change. For example, Oona Hathaway famously argues that, as the mere act of ratification reduces the scrutiny of the international community of the recalcitrant states, treaty ratifications could even worsen their rights performances.⁶ Moreover, scholars often point out serious gaps and design flaws in the human rights regime.⁷ Meanwhile, there also exists an army of human rights scholars who identify various positive influences coming from the regime. Christof Heyns and Frans Viljeon claim that the treaties have had enormous influence in shaping the understanding of human rights throughout the world and their influence is likely to grow as new

against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (*CEDAW*); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (*CAT*); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (*CRC*); *International Convention on the Protection of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) (*ICMW*); *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007, 2716 UNTS 3 (entered into force 23 December 2010) (*ICPED*) and *Disabilities Convention*. In addition to these treaties, the OHCHR identifies the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT)*, which established the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as a core human rights treaty. See *OP-CAT*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006). All these instruments create a committee of experts to monitor and facilitate their implementation. In this thesis, I refer to the above-named nine instruments as core treaties.

⁴ UN Office of the High Commissioner for Human Rights, *Human Rights Bodies* (1 November 2014) <<http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>>.

⁵ UN Office of the High Commissioner for Human Rights, *Status of Ratification Interactive Dashboard* (06 June 2016) <<http://indicators.ohchr.org/>>.

⁶ Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935.

⁷ See, eg, Eric A. Posner, *The Twilight of Human Rights Law* (Oxford University Press, 2014); Anne F. Bayefsky, *The UN Human Rights Treaty System in the 21st Century* (Kluwer Law International, 2000).

generations of lawyers, government officials and activists become more aware of them.⁸ Similarly, Sally Engle Merry's ethnographical works demonstrate the significant cultural impacts of the international human rights regime in shaping domestic reforms on violence against women.⁹ Social movement theorists tend to focus on positive potential of the language of human rights when used by people at the grassroots, while being cautious about how human rights are institutionalised.¹⁰

In an effort to understand such differing views, some scholars point out somewhat inconsistent pictures emerging from qualitative and quantitative studies, and question why methodological choices dictate the research outcomes.¹¹ A typical response to this dilemma is that, as Emilie Hafner-Burton and James Ron write, 'case specialists are embedded in twists and turns of local conditions, but statisticians fly high above the landscape focusing only on the broadest trends.'¹² However, the reason why different research methods provide differing answers is not quite clear. Some scholars ask an even more perplexing question: 'why are changes still taking place even in the failure of treaty implementation?'¹³ Similarly, Michael Freeman illustrates this situation as:

International human rights politics may seem relatively ineffective if its achievements are contrasted with human rights ideals, but they may seem more impressive if we remember that there was almost no such politics before the Second World War.¹⁴

Based on the rather diverse views concerning the outcomes of human rights treaties, one could get the impression that, to borrow an expression from Freeman, the treaties 'had less effect than lawyers and activists assumed, but more than sceptics believed.'¹⁵ In a

⁸ Christof H. Heyns and Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Kluwer Law International, 2002) 5.

⁹ Peggy Levitt and Sally Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States' (2009) 9(4) *Global Networks* 441; Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2005).

¹⁰ See, eg, Neil Stammers, *Human Rights and Social Movements* (Pluto Press, 2009); Emma Larking, 'Mobilising for Food Sovereignty: The Pitfalls of International Human Rights Strategies and an Exploration of Alternatives', 21 *The International Journal of Human Rights* (2017) (forthcoming in print, available online: www.tandfonline.com/doi/full/10.1080/13642987.2017.1314645).

¹¹ See, eg, Tom Ginsburg and Gregory Shaffer, 'How Does International Law Work?' in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 753, 770-4.

¹² Emilie M. Hafner-Burton and James Ron, 'Seeing Double' (2009) 61(2) *World Politics* 360, 374.

¹³ See, eg, Beth A. Simmons, 'From Ratification to Compliance: Quantitative Evidence on the Spiral Model' in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2013) 43, 58-60.

¹⁴ Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Polity Press, 2nd ed, 2011) 158.

¹⁵ *Ibid* 92.

nutshell, the scholarship provides a general, but controversial, view on the impacts that human rights treaties produce in national arenas.

This research aims to illuminate some of these controversies by offering a detailed and contextual examination of two implementation case studies of one treaty. Building on my findings in these studies, I engage with the theories explaining domestic human rights change, and reflect on the questions ‘*what are human rights treaties?*’ and ‘*how do such treaties affect domestic contexts?*’ In its broadest sense, this research suggests that a clue to disentangle the academic controversy lies not in the methods by which we study human rights treaties, but more deeply in the way that we understand their nature and functions. This work highlights the symbolic or political power of human rights treaties, which significantly implicates domestic contexts primarily by galvanising ordinary people.

II THESIS ARGUMENT

In this thesis, I argue that the dominant scholarly approach — which I call human rights instrumentalism¹⁶ — is inadequate in explaining the domestic impact of human rights treaties. In contrast to the instrumentalist approach, I offer a contextual approach in exploring the domestic impact of human rights treaties. The thesis presents two stories of treaty implementation for each of the countries studied — one is seen through an instrumentalist approach and the other is seen through a contextual approach. In the concluding chapter, I will compare the stories of treaty impacts emerging through each of these lenses and unfold mechanisms of treaty implementation that are largely overlooked in human rights scholarship. I will now explain the two contrasting approaches that I deploy to explore the impact of the *Disabilities Convention* in Australia and Mongolia.

A *Human rights instrumentalism*

By the term ‘human rights instrumentalism’ I refer to the academic tendency to understand human rights treaties solely on the basis of their formal legal quality. It rests on a set of assumptions that are informed by the rules of international law or positivist

¹⁶ My thanks to John Braithwaite for suggesting this term.

theories of law.¹⁷ Therefore, a brief analysis of the rules concerning international human rights obligations is useful in understanding the origins of the instrumentalist approach.

The *Vienna Convention on the Law of Treaties (the Treaties Convention)* provides that ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith.’¹⁸ As such, the principle of customary law *pacta sunt servanda* (that is the binding quality of treaties) is at the heart of the international treaty regime. The *Treaties Convention* defines international treaties as ‘agreements concluded between states in written form and governed by international law,’¹⁹ and the definition is applicable to all types of treaties regardless of their content. In other words, international law is primarily concerned with the form of an instrument, in which obligation is expressed, not with the content of those obligations.²⁰ Moreover, international law typically conceives of treaties in terms of an analogy with contracts in domestic law; that is, as consensual arrangements instituting a reciprocal exchange of goods and benefits through the medium of legal rights and duties.²¹ Although there is no explicit rule, international treaties are expected to be implemented through reciprocal exchange between consenting parties.²²

Such an apparently coherent doctrine of international law gets into trouble when it encounters human rights treaties. It is often suggested that the general principles of international law governing the application and effects of treaties need to be modified or

¹⁷ Positivist theories focus on law as a system of rules or as an authoritative system of norms. See, eg, H. L. A. Hart, *The Concept of Law* (Clarendon Press, 1961); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2009).

¹⁸ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 33 (entered into force 27 January 1980) (the *Treaties Convention*) art 26.

¹⁹ Ibid art 2(1)(a).

²⁰ Matthew Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’ (2000) 11(3) *European Journal of International Law* 489, 494.

²¹ Ibid 500. Leading textbooks of international law define treaties as agreements, of contractual character, between states, or organisation of states, creating legal rights and obligations between parties. See especially Lassa Oppenheim, *International Law: A Treatise*, Peace (Longman, 8th ed, 1955) 877. But see Malcolm N. Shaw, *International Law* (Cambridge University Press, 2008) 94. Shaw defines international treaties as:

Treaties are express agreements and are a form of substitute legislation undertaken by states. They bear a close resemblance to contracts in a superficial sense in that the parties create binding obligations for themselves, but they have a nature of their own which reflects the character of the international system.

See also J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Clarendon Press, 6th ed, 1963) 317-27.

²² Craven, above n 20, 500.

even discarded in the context of human rights treaties.²³ Unlike the treaties concerning mutual interests between states, human rights treaties govern the relationship between a state and individuals. Thus, in relation to its distinct object and purpose, international human rights law envisions a special means of implementation.

There is no single authoritative source establishing the precise meaning of human rights obligations. It is generally understood that the obligations under *ICCPR* are immediately applicable,²⁴ whereas those of *ICESCR* are to be achieved progressively.²⁵ Nonetheless, there is no simple division as such. The UN Committee on Economic, Social and Cultural Rights (ESCR Committee) has found that several provisions of the *ICESCR* including articles 3, 7(a)(i), 8, 10(3), 13(2)(a), (3), (4) and 15(3) are capable of immediate application by judicial and other institutions in many national legal systems.²⁶ The distinction between positive and negative obligations is even more complicated for the treaties concerning the rights of certain groups of people. For example, the Committee on the Rights of the Child (CRC Committee) has stated that ‘enjoyment of economic, social and cultural rights is inextricably intertwined with enjoyment of civil and political rights.’²⁷

Several treaty bodies have interpreted the nature of obligations embedded in their respective treaties. Among them, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) provides the most comprehensive guidelines for distilling the meaning of international human rights obligations.²⁸ The Committee

²³ For example, the Human Rights Committee reiterated that standard international legal rules on reservation were ‘inappropriate’ and ‘inadequate’ when dealing with reservations to the *ICCPR* and the task of determining their compatibility needs to rest with the Committee itself. See, Human Rights Committee, *General Comment No 24: General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declarations under article 41 of the Covenant*, 52th sess, UN Doc CCPR/C/21/Rev.1/Add.6 (11 November 1994). See also Craven, above n 20, 491.

²⁴ *ICCPR* art 2; Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 5.

²⁵ *ICESCR* art 2(3).

²⁶ Committee on Economic, Social and Cultural Rights, *General Comment No 3: The nature of State Parties’ Obligations*, 5th sess, UN Doc E/1991/23 (01 January 1991) para (5) (*ESCR Committee General Comment No 3*).

²⁷ Committee on the Rights of the Child, *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child*, 34th sess, UN Doc CRC/GC/2003/5 (27 November 2003) para (6) (*CRC Committee General Comment No 5*).

²⁸ Committee on the Elimination of Discrimination against Women, *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms*

interpreted the obligations under *CEDAW* as consisting of the obligations of respecting, protecting and fulfilling the rights recognised.²⁹ The obligation to respect requires states parties to refrain from taking steps that directly or indirectly result in the denial of the equal enjoyment of human rights.³⁰ States parties are also obliged to protect treaty rights from being violated by private actors.³¹ The obligation to fulfil requires State parties to take a wide variety of measures to ensure that individuals enjoy treaty rights *de jure* and *de facto*, including the adoption of temporary special measures, when necessary.³² Human rights treaty obligations involve the obligations of means and obligations of results.³³ Moreover, the CEDAW Committee established that states parties must not breach their obligations by act or omission.³⁴ Within a territory or under the effective control of states parties, human rights obligations apply to both citizens and non-citizens alike.³⁵ These obligations evenly apply across a federal jurisdiction.³⁶

Typically, states parties are required to implement human rights obligations through legislative, judicial, administrative and ‘all appropriate’ means.³⁷ Among these, the legislative measure is seen as the most fundamental step in treaty implementation.³⁸ It includes assessing the extent that domestic laws comply with treaty norms, repealing or amending an existing law that does not comply with treaty norms and the adopting of a new law that incorporates treaty norms in domestic laws. In addition to legislative measures couched in general terms, some treaties, including the *ICERD*,³⁹ *CAT*⁴⁰ and *ICED*,⁴¹ require an outright recognition of the criminality of certain acts within domestic jurisdictions. A judicial measure refers to the provision of an effective remedy

of *Discrimination against Women*, 47th sess, UN Doc CEDAW/C/GC/28 (16 December 2010) para (9) (*CEDAW Committee General Comment No 28*).

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid para 10.

³⁵ Ibid para 12.

³⁶ Ibid para 39.

³⁷ *ICERD* art 2; *ICCPR* art 2; *ICESCR* art 2; *CEDAW* art 2; *CAT* art 2; *CRC* art 2; *Disabilities Convention* art 4. Additionally, the substantive rights provisions of human rights treaties can provide more specific means of implementation. See, eg, Chapter III concerning the scope, structure and rights of the *Disabilities Convention*.

³⁸ See, eg, UNDP Pacific Centre, Office of the High Commissioner for Human Rights, *Pacific Handbook on Human Rights Treaty Implementation* (2012) 46

<http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/pacific-handbook-on-human-rights-treaty-implementation-.html>.

³⁹ *ICERD* arts 4(a), 4(b).

⁴⁰ *CAT* art 4.

⁴¹ *ICED* arts 4-7.

for breaches of treaty rights.⁴² However, the justiciability of several economic, social and cultural rights is debated.⁴³ Reinforcing these rules, the *Treaties Convention* provides that ‘a party may not invoke the provisions of its internal laws as justification for its failure to perform a treaty.’⁴⁴

The CRC Committee broadly defines the scope of administrative measures.⁴⁵ It includes the adoption of a comprehensive national strategy, coordination of rights implementation, effective monitoring through data collection and analysis, integration of human rights in privatisation and budget making, training and capacity building, and cooperation with civil society, human rights institutions and the international community.⁴⁶ Some treaties, especially those protecting the rights of specific groups (such as the *ICERD*, *CEDAW*, *CRC* and *Disabilities Convention*) emphasise cultural and educational measures.⁴⁷ In due regard to the diversities of domestic contexts, human rights law allows states parties to implement their obligations by ‘all appropriate means.’ Ultimately, however, it is for treaty monitoring bodies to determine the appropriateness of any such measure.⁴⁸ Yet, it seems that treaty bodies interpret the ‘all appropriate means’ clause to favour legislative measures.⁴⁹ As such, in the vague domain of the rules concerning international human rights obligations, the standard means of treaty implementation is legal and institutional diffusion.

⁴² See *ICCPR* art 2(3).

⁴³ Due to the nature of the rights recognised, the *ICESCR* does not have a reference to judicial measure. However, as mentioned above, the ESCR Committee suggested that several articles of the *Covenant* including articles 3, 7(a)(i), 8, 10(3), 13(2)(a), (3) and (4) and 15(3) are capable of immediate application by judicial and other organs in many national legal systems. See *ESCR Committee General Comment No 3* para 5. The Committee reinforced the claim in an additional general comment. See, Committee on Economic, Social and Cultural Rights, *General Comment No 9: The Domestic Application of the Covenant*, 19th sess, UN Doc E/C.12/1998/24 (3 December 1998) (*ESCR Committee General Comment No 9*).

⁴⁴ *Treaties Convention* art 27.

⁴⁵ *CRC Committee General Comment No 5* para 6.

⁴⁶ *Ibid.*

⁴⁷ See *ICERD* art 7, *CEDAW* arts 5, 10(c), *CRC* art-s 19, 32, 33 and *Disabilities Convention* art 8.

⁴⁸ See, eg, *CEDAW Committee General Recommendation No 28* para 28.

⁴⁹ See, eg, *ESCR Committee General Comment No 9* para 2. The Committee viewed:

But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognised in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggravated individual or group, and appropriate means of ensuring governmental accountability must be put in place.

Human rights instrumentalism is largely informed by these rules, and rests on two fundamental assumptions. First, it sees treaties as global legal rules and thus focuses on treaty texts and the direct effects of treaty norms. Such a belief is underscored by an assumption that, as John Griffiths describes, ‘legal rules do cause social phenomena because of what they prescribe, and that prescription in the legal rules must figure in the explanation of social phenomena.’⁵⁰ Consequently, as Chapter Two will demonstrate, instrumentalist literature often decry weak enforcement potentials of the international human rights regime and commonly suggest increased coercive enforcement as a means to improve the regime’s effectiveness. Second, the instrumentalist approach sees treaty ratification and legal diffusion as the principal mechanisms through which treaty norms penetrate into and change a domestic context. It focuses on a state response to human rights treaties, especially on domestic legal incorporation of treaty norms.

Human rights instrumentalism assumes a law-based, state-centric process of treaty implementation. It envisions a seemingly straightforward mechanism — starting from treaty ratification, proceeding to domestic legal incorporation, and then achieving human rights changes — implicitly assuming that one step leads to the other. The instrumentalist approach pays little attention to domestic contexts, assuming that human rights treaties, as hard international law, somehow operates independently from the context in which they are being implemented. This thesis questions the simplistic vision that human rights instrumentalism propagates — that treaties change domestic contexts by imposing legal obligations on governments.

B *Contextual approach to human rights treaties*

Drawing on the insights of regulatory theory, I offer a contextual approach to examine the domestic impacts of human rights treaties. Regulatory theory defines the concept of regulation broadly as ‘all forms of intentional activity that shapes the flow of events.’⁵¹ Regulation therefore includes both legal and non-legal interventions into social relationships. Regulatory theory avoids seeing a law as the most important form of regulation; rather, the law is seen as ‘just one strand in a web of regulatory institutions

⁵⁰ John Griffiths, 'Is Law Important?' (1979) 54(2) *New York University Law Review* 339, 343.

⁵¹ Christine Parker et al, 'Introduction' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 1, 2.

that regulate one another to greater or lesser degrees.⁵² Furthermore, regulatory theory recognises that various non-legal forms of ordering in a society interact with a law and that such interactions shape the law's outcomes. As such, the actual outcomes of a law can be quite different from those intended.⁵³ Accordingly, regulatory theory suggests paying attention to the 'intended' and 'unintended' effects of the law. Drawing attention to law's various interactions and effects, regulatory theory seems to enrich the conventional, hierarchical perspective of the law that it is handed down for implementation, which then changes social behaviours through legal enforcement.⁵⁴

For the study of human rights treaties, regulatory theory suggests two main insights. First, it reminds us to see beyond the direct effects of treaty norms and to explore the 'intended' and 'unintended' effects of treaties.⁵⁵ Studies carried out from a regulatory perspective consistently demonstrate that any type of law is quite often accompanied by significant 'unintended' consequences.⁵⁶ Second, regulatory theory suggests exploring the ways that human rights treaties interact with social relations and the structural realities of domestic contexts, which then can shape treaty effects in various ways.⁵⁷ It means that, for example, beyond examining the compliance between the treaty norms and domestic laws, we may need to explore how domestic laws and policies, which seemingly incorporate the treaty norms, were brought about. To do such analysis, regulatory theory requires an inquisitorial, inductive inquiry into a certain context.⁵⁸ Adopting these insights, I call the approach that I have deployed in this thesis in

⁵² John Braithwaite and Christine Parker, 'Conclusion' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 269, 276. John Braithwaite and Christine Parker write:

Law is almost never the most important instrument of regulation. Yet important chains of causal influences on regulated phenomena where law is totally absent are hard to think of. When law is one of the links in such loops of causation, it follows that there are variety of other variables in the loop that are regulating law.

⁵³ Christine Parker et al, above n 51, 6.

⁵⁴ Braithwaite and Parker, above n 52, 274. See also Hilary Charlesworth, 'A Regulatory Perspective on the International Human Rights Regime' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press, 2017) 357.

⁵⁵ I recognise that establishing the regulatory intention of any law can be complicated. Regarding the complex nature of establishing a law's intended purpose, see Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012) 284-326.

⁵⁶ See, eg, John Dewar, 'Regulating Families' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 82; Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 246.

⁵⁷ Parker et al, above n 51, 6.

⁵⁸ Braithwaite and Parker, above n 52, 280.

understanding the impacts that the *Disabilities Convention* produced in Australia and Mongolia a ‘contextual approach’.

Given the complexities of human rights treaties, the contextual approach seems especially fruitful in examining their domestic impacts. In their form, human rights treaties are a part of a legal regime, where the principal duty-bearers are states. Yet, the substance of these treaties purports to protect the interests of individuals, who are, in the words of Matthew Craven, ‘the fortuitous beneficiaries of a regime that is otherwise concerned with promoting the rights and interests of states.’⁵⁹ Moreover, human rights treaties encompass explicit moral propositions, which quite often are associated with strong emotional feelings.⁶⁰ Given these ‘oddities’ as interstate laws, human rights treaties may operate at different levels and may produce various effects, and thus, to me, the contextual approach offers a promising direction to explore the nuances of the treaties’ functions at domestic levels.

III RESEARCH METHODOLOGY

A *Aim, questions and scope*

This research aims to understand the domestic effects of human rights treaties through a study of the impacts that the *Disabilities Convention* produces in Australia and Mongolia. The central question of this research is: ‘*what impacts has the Disabilities Convention produced in the two countries studied?*’ In line with the contextual approach that I described above, two secondary questions guiding this research are: ‘*to what extent, and how, has the Disabilities Convention had an effect on the laws and policies of Australia and Mongolia?*’ and ‘*Beyond laws and policies, what other impacts has the Disabilities Convention produced in the two countries studied?*’ This research seeks to understand the legal and non-legal as well as the direct and indirect effects of the *Disabilities Convention* and the ways that the treaty interacts with domestic laws, politics and social contexts of Australia and Mongolia.

At the conceptual level, this thesis is a dialogue between existing theories of human rights treaty implementation and two implementation stories of one treaty. Although the research found a similar pattern from the two countries, I do not claim that the findings

⁵⁹ Craven, above n 20, 493.

⁶⁰ See especially Wibren van der Burg, *The Dynamics of Law and Morality: A Pluralist Account of Legal Interactionism* (Ashgate, 2014).

are generalisable over all human rights treaties and domestic contexts. It should be borne in mind that, generally speaking, human rights treaties are dissimilar to each other due to the practices they aim to influence. As Beth Simmons notes, some treaties, such as *ICCPR* and *CAT*, can directly affect the ability of governments to maintain political control, whereas others, including *ICERD*, *CEDAW* and *CRC*, are much more important for their social impact than their direct political implications.⁶¹

Few people would doubt that domestic contexts vary across the world. This research documents an early stage of the *Convention*'s implementation and the findings recorded within such a limited timeframe may not remain representative across time, even in the same country. Nonetheless, this research provides systematic and grounded evidence of the ways that the *Disabilities Convention* plays out in two domestic contexts in order to 'make visible precisely what is visible.'⁶² Put simply, a description of the reality that I found in Australia and Mongolia and an analysis of what such realities suggest to the human rights scholarship are the main contributions that I offer in this thesis.

B Research method

In the first phase of the research, I reviewed the disability laws and policies of Australia and Mongolia, and studied recent policy developments in the area. On the basis of this desk study, I conducted semi-structured interviews with key actors who actively participate in the implementation of the *Disabilities Convention* and/or who are recognised human rights experts. These key actors include civil society activists, academics, government officials and politicians. Many of these individuals hold two or more of these positions, or travel between different roles. It should also be noted that a significant number of the research participants are people with disabilities and their

⁶¹ Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009) 15. But this too is very general observation.

⁶² Michel Foucault, 'La Philosophie Analytique de la Politique' in Daniel Defert and Francois Ewald (eds), *Dits et écrits: 1954-1988* (Éditions Gallimard, 1994) vol 3, 232, 540-1 quoted in Anne Orford, 'In Praise of Description' (2012) 25(3) *Leiden Journal of International Law* 609, 617. Foucault writes:

It has long been known that the role of philosophy is not to discover what is hidden, but to make visible precisely what is visible, that is to say, to show that which is so close, which is so immediate, which is so intimately linked to us, that because of that we do not perceive it. While the role of science is to communicate that which we do not see, the role of philosophy is to make us see what we see (Orford's translation).

perspectives are intrinsically linked to their personal experiences of how recent policy changes play out in their lives. I made every effort to reflect the voices of research participants to the greatest possible extent in the research. In order to provide the participants with the fullest opportunity to tell their stories and to encourage their voices to come through in the interviews, I employed open-ended questions. An indicative list of the interview questions is annexed to the thesis.

I undertook a total of 66 formal interviews in the two countries. In Ulaanbaatar, I interviewed 39 actors between May and July 2013. In Australia, I interviewed 27 actors in Sydney, Melbourne and Canberra from February to April 2014. After the official fieldwork, I maintained regular contact with some of the interviewees through whom I was informed about developments in the sector and exchanged views on various issues emerging from the research. Also, via webcast or in person, I took part in and observed several events, conferences and training programs related to the subject matter of the research. I used social media platforms — Twitter and Facebook — to follow events, community debates and personal views concerning issues related to the implementation of the *Disabilities Convention* in Australia and Mongolia.

Ethical implications of the research were carefully considered, and a respective application was approved by the ANU Human Research Ethics Committee in April 2013.⁶³ The protocols outlined in the application were strictly followed and regularly monitored until the closure of the protocol in December 2017. No ethical concern was raised or known to me or to the supervisory panel members, during and after the fieldwork. I emailed direct quotes to the interviewees for comments and some comments suggesting amendments came in after the thesis submission in July 2017. These amendments were reflected in the final revision of the thesis. I acknowledge that direct quotes from the Mongolian participants are my translation. Finally, I also acknowledge that my past professional involvement with the National Human Rights Commission of Mongolia (the NHRCM or the Commission) was an advantage for me in undertaking this research and allowed access to key actors from the two countries.

⁶³ Narantuya Ganbat 'Implementation of the UN Convention on the Rights of Persons with Disabilities in Australia and Mongolia' (Protocol 2013/097) approved on 18 April 2013.

C Case studies

1 The treaty

I chose to study the *Disabilities Convention* for three reasons. First, it fitted well in terms of timing of the research. The UN General Assembly adopted the *Convention* in December 2006. Australia ratified the *Disabilities Convention* in 2008 and Mongolia acceded to the treaty in 2009. The research thus covers the initial decade of the *Convention*'s existence in the two countries. A decade is a short span to capture the picture of domestic implementation of a human rights treaty fully. However, the initial decade is an important period to observe domestic responses to a human rights treaty, because, within this period, the foundational steps to implement the treaty are taken. The negotiation, adoption and ratification of the *Disabilities Convention* quickly triggered a range of actions at local, regional and international levels. For the research duration, local discussions about the ratification, implementation and reporting of the *Convention* were still new in Australia and Mongolia. Despite this, I was able to document a retreat and inaction from both governments in relation to their treaty commitments. During this decade, the two governments took the initial steps to implement the *Convention* and reported thereon to the UN Committee on the Rights of Persons with Disabilities (the CRPD Committee).⁶⁴ Treaty reporting is an important international and domestic engagement that is revealing of many aspects of the domestic impact of the international human rights regime.

Second, as Chapter Three will demonstrate, the *Disabilities Convention* is a fascinating human rights treaty with many elements to engage the interests of international legal scholars. As one of the newest treaties, it reflects the 'best practices' and lessons of international human rights law. The *Convention* focuses on norm implementation and prescribes the means to implement human rights obligations in a great detail. As a result, it has many aspects that seem to intrude into the domestic decision-making sphere of states parties to an unparalleled extent. Additionally, due to complex experiences of disability, the *Convention* extends the conventional framework of

⁶⁴ Australia submitted its initial report under the on the *Disabilities Convention* in December 2010, and appeared before the CRPD Committee in September 2013. Mongolia tabled its initial implementation report in April 2011, and the CRPD Committee considered Mongolia's report in April 2015.

international human rights law.⁶⁵ Despite these features, the interest of international legal and human rights scholars in this treaty still seems marginal.⁶⁶ With this research, I hope to address this gap.

Third, the research draws on my professional experience. In August 2006, together with my principal duty as policy officer, I was assigned to the role of disability rights focal point of the NHRCM. At that time, drafting of the *Disabilities Convention* was nearing its end. In consideration of the international developments around the *Convention*, the NHRCM gave priority to disability issues and, in cooperation with other actors, took various actions for promoting the rights of persons with disabilities and the ratification of the *Disabilities Convention* by Mongolia. I had the privilege and opportunity to contribute to and be closely involved in all these processes. Due to overseas study, my official engagement with Mongolian disability sector was ended in June 2008. Although I continued working for the NHRCM in 2010-12, I did not have direct engagement with the sector.

Moreover, my personal interests and professional activities have revolved around issues of the domestic impact of international treaties. In most of my time working for the NHRCM, I was responsible for monitoring the implementation of Mongolian laws and international treaty obligations in civil and political rights area. Before joining the Commission, as a law student at the National University of Mongolia, I volunteered for Amnesty International Mongolia, and then was employed as a coordinator at the Mongolian NGOs' campaign for the ratification of the *Rome Statute of the International Criminal Court*.⁶⁷ Based on this experience, I wrote my bachelor's degree dissertation on the topic of '*The Implications of the Rome Statute on the Mongolian Legal Order*.' Later, I pursued this interest during my studies at Melbourne Law School. Through my professional experiences, I sensed that human rights treaties affect a domestic context in more complex ways than what is being taught at most law schools. So, the present research is also a journey for me to explore this intuition.

⁶⁵ See Part II of Chapter Three.

⁶⁶ See, eg, Arlene S. Kanter, *The Development of Disability Rights under International Law: From Charity to Human Rights* (Routledge, 2015) 6-7. Arlene Kanter notes that mostly disability law scholars, but not many international legal scholars, write on the *Disabilities Convention*.

⁶⁷ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (*Rome Statute*).

2 *Domestic contexts*

This research examines two countries, Australia and Mongolia. As the research explores the nature of a phenomenon, requiring an in-depth understanding of domestic contexts, these countries were the most convenient countries to examine within the limited time of my PhD study. Both countries are liberal democracies and they are also party to numerous human rights treaties. Apart from these aspects, in the conditions affecting the implementation of human rights treaties such as legal systems, domestic human rights protection, domestic application of international human rights treaties, and social, political and economic contexts, there is little resemblance between the two countries. Their rich contrasts, which I will discuss in more detail in Chapter Five, add an important value to this research.

D *Thesis Structure*

The present thesis, demonstrating the limits of the instrumentalist approach in explaining the domestic impacts of human rights treaties, comprises ten chapters. Chapter Two analyses human rights scholarship using the two contrasting lenses, the instrumentalist and contextual, that I described in this chapter. In particular, Chapter Two engages with two main areas of human rights treaty scholarship: the research on treaty impacts and theories explaining the mechanisms of treaty implementation. The Chapter argues that human rights scholarship is dominated by instrumentalist explanations for domestic impact and mechanisms of the treaties.

Chapter Three provides an overview of the *Disabilities Convention*. Highlighting its instrumental purpose, the Chapter discusses the scope, structure and content of the *Convention*. It then discusses the conceptual innovations of the *Disabilities Convention* and explains the reasons why it became an innovative treaty in international human rights law. Following that, the Chapter discusses the human rights approach to disability — a specific philosophy or moral proposition put forward in the *Convention* regarding disability, people with disabilities, and their entitlements. The chapter highlights the moral propositions of human rights treaties, which are often overlooked in the scholarship and practice.

Chapter Four brings the political dimensions of the *Convention* to the discussion. It first describes the emergence of social approaches to disability, providing the ideological impetus of the *Convention* and the rise of disability movements in some countries of Europe and North America. The chapter then moves to processes at the UN leading to the *Disabilities Convention*. In particular, it explores the shifting approach of the UN towards people with disabilities in legal and policy instruments preceding the *Convention* and discusses major events that triggered these attitudinal changes. Finally, in Chapter Four, I identify three non-legal purposes of the *Disabilities Convention*, highlighting its political dimensions.

Chapter Five introduces Australia and Mongolia, with the focus on their conditions that affect the domestic impact of human rights treaties. These include their governance and legal systems, human rights protection and culture, the rules determining the application of international human rights treaties and some aspects of their political and social contexts. The chapter highlights the rich contrasts between the two country case studies.

Chapter Six illustrates the implementation of the *Disabilities Convention* in Australia as captured through an instrumentalist lens. As discussed in this Chapter, human rights instrumentalism approaches treaties from a legalistic perspective, focusing on state responses to the treaties and especially on the legal and policy measures directed to incorporate treaty norms into the domestic legal order. Accordingly, Chapter Six describes intense legal and policy developments that followed the *Convention's* ratification by Australia. It then examines two key examples of such legislative reforms, disability service reform and an inquiry into migration laws. On one hand, the Chapter demonstrates the significant commitment of the Australian government to implement the *Convention*. On the other hand, it shows the reluctance of the Australian government to make substantive changes in some other areas of law, despite the recommendations given by international and domestic authorities to bring its domestic laws in line with the *Disabilities Convention*.

Chapter Seven presents a contextual story of the *Convention's* impacts on Australia. It first traces the history of the NDIS as the most important example of recent disability reforms and demonstrates that the *Convention's* influence in achieving the reform was not primarily as direct as the instrumentalist story suggested. The Chapter then discusses the *Convention's* impacts on Australia from the perspectives of local actors.

The local actors that I interviewed from Australia considered that the most important impact of the *Disabilities Convention* was non-legal. By galvanising local actors, the *Convention* contributed to creating political momentum to achieve significant policy reforms even before it was adopted.

Chapter Eight discusses the instrumentalist story of Mongolia's implementation of the *Disabilities Convention*. Similar to the Australian instrumentalist story, this Chapter argues that the *Convention's* implementation has had a mixed record in Mongolia. On one hand, Mongolian governments were committed to implement the *Disabilities Convention*, adopting the *Law on the Rights of a Person with Disability 2016* and introducing the system of early diagnosis and support of children with disabilities. On the other hand, the miscomprehension of the *Convention's* philosophy and norms and lack of domestic infrastructure to deliver the legal reforms obstruct Mongolia's treaty commitment.

Chapter Nine explores the impacts of the *Disabilities Convention* on Mongolia in context. It traces the actual processes behind recent Mongolian legal reforms and demonstrates that the drivers of the reforms were committed individuals, rather than government commitment to the *Convention*. Moreover, based on the views of local actors and my observations, the chapter discusses non-legal impacts of the *Convention* that are significantly affecting the social fabric of Mongolia. The chapter also discusses the changes that occurred to organisations of people with disabilities (DPOs) in the last few years and describes the subtle and complex influences of the *Disabilities Convention* on the changes.

Chapter Ten concludes the thesis by comparing the views that are seen through instrumentalist and contextual lenses. The Chapter highlights the contextual approach, providing rich and complex pictures of the impacts that the *Disabilities Convention* produced in Australia and Mongolia. Based on the research discussed in the thesis, Chapter Ten demonstrates the limitations of the instrumentalist approach to human rights treaties, which obstructs the scholarship from understanding the potent political power of the international human rights regime. Ultimately, this thesis highlights the symbolic power of international human rights treaties, which affect domestic contexts regardless of domestic legal incorporation.

CHAPTER TWO

HUMAN RIGHTS SCHOLARSHIP

I INTRODUCTION

In the aftermath of the Cold War, academic interest in human rights treaties has flourished. Many scholars attempted to measure quantitatively the degree that these treaties changed domestic contexts. Others proposed theories attempting to explain the mechanisms whereby human rights change occurs. This Chapter reviews these scholarly works. In particular, using the two contrasting lenses — instrumentalist and contextual — that I distinguished in the previous chapter, I will analyse the assumptions about the nature of human rights treaties and the mechanisms of their implementation that underlie the scholarship in the area. As discussed, human rights instrumentalism understands the treaties from a legalistic point of view, focusing on the direct effects of treaty norms, in which a state's responses such as treaty ratification and domestic legal incorporation are definitive. In contrast, seeing a law as an instrument of regulation while itself being regulated by contextual realities, the contextual approach seeks to understand the various interactions and effects emanating from human rights treaties in a particular context. This Chapter demonstrates the dominance of instrumentalist understandings of the treaties in human rights scholarship.

The Chapter consists of two parts, discussing the two main areas of human rights scholarship. Part II examines the assumptions of human rights treaties, which underlie treaty-outcome research. This area of research is mostly quantitative. In contrast to quantitative research, two pieces of qualitative research on the domestic impact of the international human rights regime, undertaken by Christof Heyns and Frans Viljeon and Sally Engle Merry, will also be examined in Part II. Part III analyses theories on the mechanisms of a human rights change. I engage here with four widely acclaimed theories, namely, the transnational legal process theory of Harold Koh, the domestic political mobilisation theory of Beth Simmons, the transnational activist network theory of Thomas Risse et al, and the state socialisation theory of Ryan Goodman and Derek Jinks.

II MEASURING HUMAN RIGHTS NORM COMPLIANCE

Research on domestic effects of human rights treaties is mostly quantitative. Linda Camp Keith carried out one of the earliest examples of this kind of research, assessing the level of difference that the *ICCPR* and its first *Optional Protocol (ICCPR-OP-I)* made in 178 countries in 1976-93.¹ Keith finds no practical difference between party and non-party states to the treaties and concludes ‘it may be overly optimistic to expect that being a party to an international covenant will produce an observable impact.’² According to Keith, the problem exists because of ‘too weak treaty implementing mechanisms and too much reliance on goodwill of the party states.’³

Oona Hathaway analyses the practices of 166 countries in five areas of human rights (genocide, torture, fair and public trial, civil liberties and political representation of women) over more than a decade and her findings support those of Keith.⁴ Hathaway reports that the treaties may even worsen human rights practice as the seemingly inexpensive ratification without effective monitoring and enforcement relieves pressure on recalcitrant states and allows them to tiptoe from international scrutiny.⁵ To improve the regime’s effectiveness, Hathaway suggests to the UN that it should strengthen the monitoring and enforcement of the treaties by introducing a stricter membership policy.⁶ Hathaway explains that:

Countries might, for example, be required to demonstrate compliance with certain human rights standards before being allowed to join a human rights treaty. This would ensure that only those countries that deserved an expressive benefit from treaty membership would obtain it. Or membership in a treaty regime could be tiered, with a probationary period during the early years of membership followed by a comprehensive assessment of country practices for promotion to full membership.⁷

¹ Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does it make a difference in human rights behavior?' (1999) 36(1) *Journal of Peace Research* 95.

² Ibid 112.

³ Ibid.

⁴ Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935.

⁵ Ibid 1989.

⁶ Ibid 2024.

⁷ Ibid (footnote omitted).

A study by Emilie Hafner-Burton and Kiyoteru Tsutsui adds nuance to Hathaway's argument.⁸ Similar to the previous two scholars, Hafner-Burton and Tsutsui quantitatively analyse the human rights practices of a large number of countries concerning six human rights treaties.⁹ Their findings conform to that of Hathaway, indicating that ratification of all treaties studied does little to encourage better human rights practices and cannot stop governments from repressive behaviour, and may even exacerbate poor practices.¹⁰ Yet, the research reports that countries where a large number of the population belong to international nongovernmental organisations (INGOs) are more likely to protect their citizens.¹¹ In line with predictions about the theories that the research aims to test,¹² Hafner-Burton and Tsutsui argue that empty promises of human rights treaties paradoxically produce positive outcomes in the hands of INGOs, who provide 'the enforcement mechanism that international human rights treaties lack, and can often pressure increasingly vulnerable governments toward compliance.'¹³

Eric Neumeyer also carries out a statistical analysis to assess the effects of *ICCPR*, *ICCPR-OP-I* and *CAT*, and several regional instruments concerning similar issues.¹⁴ His findings support the overall conclusions of the previous studies suggesting that treaty

⁸ Emilie Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110(5) *American Journal of Sociology* 1373.

⁹ The six treaties are *ICCPR*, *ICESCR*, *ICERD*, *CEDAW*, *CRC* and *CAT*.

¹⁰ Hafner-Burton and Tsutsui, above n 8, 1398.

¹¹ *Ibid.*

¹² *Ibid* 1382-5. The research is designed to test a hypothesis that Hafner-Burton and Tsutsui draw on rational institutionalism in international relations and the world society approach in sociology. About these approaches, see generally John W. Meyer and Brian Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83(2) *American Journal of Sociology* 340; John W. Meyer and W. Richard Scott, *Organizational Environments: Ritual and Rationality* (Sage, 1983); John W. Meyer et al, 'World Society and the Nation-State' (1997) 103(1) *American Journal of Sociology* 144; Martha Finnemore, 'Norms, Culture and World Politics: Insights from Sociology's Institutionalism' (1996) 50(2) *International Organization* 325.

¹³ *Ibid* 1385-6. According to the authors, INGOs increasingly leverage global human rights norms as a lobbying tool to pressure national governments to improve their human rights practices. The legitimacy of human rights principles makes target governments vulnerable to potential embarrassment and loss of legitimacy in international society resulting from noncompliance with international human rights law.

¹⁴ Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' (2005) 49(6) *Journal of Conflict Resolution* 925. The regional instruments include *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953); *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment*, opened for signature 26 November 1987, ETS No 126 (entered into force 1 February 1989); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978); *Inter-American Convention to Prevent and Punish Torture*, opened for signature 9 December 1986, OASTS No 67 (entered into force 28 February 1987); *African Charter on Human and People's Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986).

ratification of pure autocracies with no civil society is associated with a worsening of human rights. However, the research also reports that ratification has more beneficial effects ‘more democratic the country is and the stronger is its civil society.’¹⁵ Further Neumeyer notes, ‘[c]ivil society strength only lowers human rights violations in countries that have ratified [the treaties studied].’¹⁶

In the cases of the *ICCPR*, *CAT* and *CEDAW*, Oona Hathaway quantitatively examines the reasons why states commit to human rights treaties.¹⁷ Although Hathaway’s focus in this research is not directly on treaty implementation, what she finds extends her previous argument. Hathaway reasons that human rights treaties lack international enforcement and therefore are largely ineffective by nature.¹⁸ She writes ‘whether states will commit to a treaty depends in significant part on whether they expect to comply with it once they join.’¹⁹ But domestic legal enforcement and collateral consequences of the decision to ratify a treaty, which refers to the potential of civil society to enforce the treaty on its government, are the two factors that make not only the treaties effective, but also ratification costly.²⁰ To improve the effectiveness of the treaty commitment, Hathaway suggests the international human rights regime shift the attention to the countries that may succeed in complying with treaty requirements and to offset ratification costs by helping them in strengthening domestic rule of law.²¹

In an award-winning book, Hafner-Burton analyses the effectiveness of the international human rights regime using both quantitative and qualitative evidence, including ‘the

¹⁵ Ibid 941.

¹⁶ Ibid 950. Neumeyer writes:

In most cases, for treaty ratification to work, there must be conditions for domestic groups, parties, and individuals and for civil society to persuade, convince, and pressure governments into translating the formal promise of better human rights protection into actual reality. Hafner-Burton and Tsutsui are right in suggesting positive role of civil society strength on human rights, but it is the interaction with treaty ratification with treaty ratification that often matters.

¹⁷ Oona A. Hathaway, ‘Why Do Countries Commit to Human Rights Treaties?’ (2007) 51(4) *Journal of Conflict Resolution* 588. Hathaway claims that the research covers the practices of 160 countries during a period of several decades.

¹⁸ Ibid 592.

¹⁹ Ibid 590.

²⁰ Ibid 612-3. Hathaway argues that ‘the very factors that lead countries to comply with treaties can cause those same states not to commit. Where compliance is more likely, commitment is often most consequential. By contrast, where compliance is least likely, commitment is often relatively costless.’

²¹ Ibid 613.

perspective of practitioners working inside the system.’²² Hafner-Burton claims that today’s human rights treaty regime faces a ‘crisis of legitimacy and relevance due to its universal membership that is open to countries with no intention to honour their commitments’²³ and the regime’s impacts ‘are few in the areas where many of the worst or most human rights abuses actually occur.’²⁴ To solve these problems, Hafner-Burton suggests improving the coercive powers of the regime. In particular, the regime must stop expanding, and must also invest in its credibility and legitimacy by excluding recalcitrant states. Moreover, the regime needs to effectively organise the efforts of ‘steward’ states, those countries with the strongest interest in promoting human rights abroad.²⁵ To tap on the power and potentials of steward states, Hafner-Burton recommends a ‘triage model’ strategy — the cooperation of steward states, NGOs and national human rights institutions (NHRIs).²⁶ Hafner-Burton argues that such cooperation with local constituencies would ensure the success of intervention as it adds legitimacy and local congruence to the efforts of steward states, and writes:

NGOs and NHRIs can directly assist in implementing foreign backed punishments, rewards and other forms of diplomacy that are intended to promote human rights while raising the odds that those policies resonate with local issues, customs and practices. These local organisations can broadcast, endorse and legitimise foreign efforts within their community even as they appeal to local stakeholders without whose support foreign efforts to improve human rights will fall flat.²⁷

In addition to this research focusing on treaty effects, there is other research that approaches other aspects of human rights treaties quantitatively such as reporting practices.²⁸

This quantitative research is commonly underpinned by an instrumentalist view of human rights treaties: for example, it focuses on the direct effects of treaty norms. Although some scholars recognise that treaty effects are diffused and practices may not

²² Emilie M. Hafner-Burton, *Making Human Rights a Reality* (Princeton University Press, 2013) 86.

²³ Ibid 117-133.

²⁴ Ibid 43.

²⁵ Ibid 130-3.

²⁶ See ibid 176-92.

²⁷ Ibid 152.

²⁸ See, eg, Cosette D. Creamer and Beth A. Simmons, 'Ratification, Reporting and Rights: Quality of Participation in the Convention against Torture' (2015) 37(3) *Human Rights Quarterly* 579; Malcolm Langford and Sakiko Fukada-Parr (eds), *Quantifying Human Rights*, (30(3) *Nordic Journal of Human Rights*: Special Issue, 2012).

represent the changes that the treaties made,²⁹ they measure treaty effectiveness on the basis of data that is believed to be indicating relevant practices.³⁰ Such a method of inquiry assumes that treaty norms should be the main factor explaining the observed practice. Moreover, this research commonly assumes the ratification as a turning point, where treaties start changing local practices. Practices are compared either before and after countries' ratification of human rights treaties, or between states parties and non-party states. Furthermore, the quantitative research communicates a belief that the effectiveness of treaties is dependent on the existence of enforcement mechanisms. Finding little or no practical improvements (indeed in some cases, worsened practices) associated with treaty ratification, this research commonly suggests the improved coercive potential as a missing ingredient in the recipe for a better treaty regime.

A few studies indicating the complex functions of human rights treaties in domestic spheres resist the idea that treaty effects can be measured quantitatively. For example, Christof Heyns and Frans Viljeon examine the impact of the international human rights regime on 22 countries representing different world regions.³¹ These scholars approach the treaty outcomes broadly covering 'any influence may have occurred as a result of the work of international mechanisms for norm enforcement ... or because treaty norms have been internalised in domestic legal systems and cultures.'³² Heyns and Viljeon find that the regime has its greatest impact where treaty norms are incorporated into domestic law, and not as a result of direct norm enforcement such as treaty reporting, individual complaints or inquiry procedures.³³

Several findings of this research shed light on the complexities of the process of treaty implementation. For example, the research suggests that the cultural effects of human

²⁹ See, eg, Hathaway, above n 17, 592.

³⁰ Shortcomings of quantitative data in studying human rights treaty implementation are widely discussed. See Robert Justin Goldstein, 'The Limitations of Using Quantitative Data in Studying Human Rights Abuses' (1986) 8(4) *Human Rights Quarterly* 607, William Seltzer and Margo Anderson, 'The Dark Side of Numbers: The Role of Population Data Systems in Human Rights Abuses' (2001) 68(2) *Social Research* 481, David Weissbrodt, 'Do Human Rights Treaties Make Things Worse?' (2003) 134 *Foreign Policy* 88, Sally Engle Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance' (2011) 52(S3) *Current Anthropology* S83. Cf Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Routledge, 2010).

³¹ Christof H. Heyns and Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Kluwer Law International, 2002) 5.

³² Ibid 1.

³³ Ibid 5.

rights treaties are undeniable, but their impact on domestic laws is inconclusive. Heyns and Viljeon write, ‘the treaties have had their greatest influence on the domestic level in shaping the understanding of government officials, and members of civil society as to what is to be considered as basic human rights,’³⁴ yet ‘a direct causal link between treaty system and legislative or policy reforms on the domestic level is often difficult to establish conclusively.’³⁵ These scholars further write:

[E]ven in the cases where the treaties have not yet been ratified, they have informed processes where human rights provisions of new constitutions were drafted. The treaty system has largely defined the international consensus on human rights norms, which in many instances are simply adhered to because they are considered to be appropriate.³⁶

Interestingly also, Heyns and Viljeon suggest that international legal enforcement may produce counterproductive effects, because it singles out the countries that are more engaged with treaty enforcement machinery as human rights violators, whereas disengaged countries can by and large escape criticism from the treaty system.³⁷

An ethnographic study by Sally Engle Merry that explores the impact of international human rights interventions on violence against women in India, China, Fiji, Hong Kong and the USA provides a compelling contrast to the instrumentalist scholarship.³⁸ Merry illustrates how the idea that violence against women is crime travels from ‘the global site of production’ and to ‘local sites of appropriation’ and brings attention to a crucial, yet neglected face of human rights — human rights as ideas. In contrast to the instrumentalist vision of treaty implementation, ‘human rights are generally adopted rather than imposed,’ argues Merry.³⁹ National and local actors, who see the potential benefits of the framework and redefine their agendas accordingly, appropriate the ideas of human rights around the world.⁴⁰ The legal framework provides an international

³⁴ Ibid 6.

³⁵ Ibid 4.

³⁶ Ibid.

³⁷ Ibid.

³⁸ See Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2005).

³⁹ Ibid 225.

⁴⁰ Ibid 227.

audience for local problems.⁴¹ Also, the human rights perspective offers ‘a new cultural framework that breaks with past ways of understanding behaviour.’⁴²

The process of adopting a new cultural framework is intricate and, to a large degree, dependent on the relationship between an idea and a context. Merry writes ‘[h]uman rights ideas are more easily adopted if they are packaged in familiar terms and do not disturb established hierarchies, but they are more transformative if they challenge existing assumptions about power relationships.’⁴³ Human rights ideas are localised through the works of national elites and mid-level activists (or intermediaries), ‘who have one foot in the transnational community and one at home,’⁴⁴ translating local problems into human rights terms and human rights concepts into approaches to local problems. These actors translate human rights ideas into national and local communities often using familiar ‘images, symbols, narratives, and religious or secular language,’⁴⁵ but not changing their fundamental meanings.⁴⁶ The grassroots people seeking protection come to see the relevance of a human rights framework for their lives only through intermediaries. While the ideas of human rights add a new interpretation of an issue to ordinary people, it does not displace the old ones, but it is layered over them.⁴⁷

⁴¹ Ibid.

⁴² Ibid. Such a break from the old way of thinking is critical in changing behaviours, because, for example, wife battering was long accepted as normal but must be redefined as offensive in order to diminish its frequency. ‘This is a process of appropriation,’ explains Merry.

⁴³ Ibid 222.

⁴⁴ Ibid 229.

⁴⁵ Ibid 220.

⁴⁶ Ibid 219. Merry writes:

Translation requires three kinds of changes in the form and presentation of human rights ideas and institutions. First, they need to be framed in images, symbols, narratives, and religious or secular language that resonate with local community... Second, they need to be tailored to the structural conditions of the place where they are deployed, including its economic, political, and kinship system. Shelters focus on getting Hong Kong women into public housing while Delhi and Beijing activists find the concept of shelters less valuable since finding housing outside the family is virtually impossible. Third, the target population needs to be defined. Victims of domestic violence in the United States are typically intimate partners, not necessarily married or heterosexual, whereas in China they are typically members of an extended household of several generations but not necessarily in intimate sexual relationships.

⁴⁷ Ibid 220.

‘Whether the rights layer of understanding endures or not depends on the institutional response claimants receive,’ writes Merry.⁴⁸

Merry’s research demonstrates the limitations of approaching human rights from a purely legalistic perspective and suggests interesting dynamics existing between legal frameworks and cultural practice of human rights. For example, Merry writes, ‘[t]he legal framework makes it more difficult to tailor human rights standards to local contexts, yet this is also the basis for claiming transnational legitimacy for these standards.’⁴⁹ Nonetheless, the endurance of a human rights consciousness among people at the grassroots depends on an institutional response to their claims or, in other words, depends on state action. Merry argues, ‘if a state sets up the institutions and promotes human rights ideas, there will be wider support for claims by NGOs and citizens.’⁵⁰

Compared with quantitative research, the evidence from domestic contexts presented in the research of Heyns and Viljeon and Merry demonstrates the complex ways that human rights treaties may function on the ground. For example, these authors suggest that, even in the absence of coercive enforcement, the international human rights regime yields significant cultural effects. They also indicate that human rights treaties may function in various forms, such as a legal framework and ideas, and bear various consequences. The instrumentalist approach assumes direct causation between ratification of human rights treaties and domestic legal and institutional change. In contrast, qualitative research suggests that disparities can exist between the two conditions. Importantly also, this research demonstrates the need to explore domestic impacts of the international human rights regime on the basis of systematic, contextual evidence.

III THEORISING HUMAN RIGHTS CHANGE

Theorising the mechanics of human rights change is another common approach in the scholarship. In contrast to the research discussed above focused on measuring treaty effects, theories explaining the mechanisms of treaty implementation seem to convey richer accounts of the effects of human rights treaties. This part engages with four influential theories in the area, including the transnational legal process theory of

⁴⁸ Ibid.

⁴⁹ Ibid 222.

⁵⁰ Ibid 223.

Harold Koh, the domestic political mobilisation theory of Beth Simmons, the transnational activist network theory of Thomas Risse et al and the state socialisation theory of Ryan Goodman and Derek Jinks. The aim of this part is two-fold. First, it provides an overview of scholarly understanding of mechanisms of human rights change, which I will engage in Chapter Nine. Second, using the instrumentalist and contextual lenses of human rights treaties that I explained in the previous chapter, I will analyse how these theories understand the nature and function of human rights treaties.

A Transnational legal process theory

International legal scholar Harold Koh writes that, unlike the conventional story of international legal enforcement where the principal norm enforcers have always been nation states,⁵¹ international human rights norms ‘are enforced through a complex, less understood process of transnational legal process (TLP).’⁵² Building on the work of Abram and Antonia Chayeses⁵³ and Thomas Franck,⁵⁴ who advocate the view that international law is implemented without enforcement, Koh argues that TLP achieves obedience — a rule complaint behaviour driven by a sense of internal acceptance of international law.⁵⁵ Koh distinguishes obedience from three other forms of causal relationships between treaty norms and the observed conduct of states: coincidence, conformity and compliance. In coincidence, no causal relationship exists between the treaty norms and the observed practice as states happen to ‘follow’ the same norms.⁵⁶

Conformity is another possibility, where states loosely conform their conduct to treaty norms as they see it convenient to do so, ‘but feel little or no internal obligation — legal or moral — to follow the rule.’⁵⁷ When compliant this way, states are both aware of treaty norms and consciously accept their influence, but do so in order to gain rewards

⁵¹ Harold Hongju Koh, 'How Is International Human Rights Law Enforced?' (1998) 74(4) *Indiana Law Journal* 1397, 1408.

⁵² Ibid 1399. See also Harold Hongju Koh, 'The 1998 Frankel Lecture: Bringing International Law Home' (1998) 35(3) *Houston Law Review* 623; Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106(8) *Yale Law Journal* 2599; Harold Hongju Koh, 'Transnational Legal Process' (1996) 75(1) *Nebraska Law Review* 181.

⁵³ Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1998).

⁵⁴ Thomas M. Franck, *Fairness in international law and institutions* (Oxford University Press, 1998).

⁵⁵ Koh above n 51, 1408. See also Koh, 'Bringing International Law Home', above n 52, 627-42.

⁵⁶ Koh, 'Bringing International Law Home', above n 52, 628.

⁵⁷ Ibid.

or to avoid from punishment.⁵⁸ Nonetheless, the repeated compliance with human rights norms, though TLP, leads to obedience.

TLP occurs through three major steps: interaction, interpretation and internalisation.⁵⁹ In most cases, human rights norm internalisation is prompted not by nation-states, but by transnational norm entrepreneurs, the private actors who can prompt the entire process regardless of their association with states.⁶⁰ In particular, norm entrepreneurs can mobilise popular opinion and political support, develop transnational issue networks and activate law-declaring fora or an interpretative community.⁶¹ In the first stage of TLP, these actors seek to develop transnational issue networks to generate political solutions among concerned individuals at the national, regional and global levels involving government agencies, intergovernmental organisations, INGOs, private foundations and academics.⁶² Norm entrepreneurs also seek to enlist national government officials who are concerned with the same issues as allies for the cause.⁶³ Koh writes:

Nongovernmental actors do not work alone. ...[T]hey invariably seek government officials who will act as allies and sponsors for the norms they are promoting. Once engaged, these governmental norm sponsors work inside bureaucracies and government structures to promote the same changes inside organized government that nongovernmental norm entrepreneurs are urging from the outside. Not infrequently, officials within governments or intergovernmental organizations become so committed to using their official positions to promote normative positions that they become far more than passive sponsors, but, rather, complementary “government norm entrepreneurs” in their own right.⁶⁴

At the second stage of the TLP — the interpretative stage — transnational actors approach governmental and nongovernmental fora competent to declare both general norms of international law and specific interpretation of those norms.⁶⁵ Law-declaring fora include ‘treaty regimes, domestic, regional and international courts, ad hoc tribunals, domestic and regional legislatures, executive entities, international publicists,

⁵⁸ Ibid.

⁵⁹ Koh, above n 51, 1399.

⁶⁰ Ibid 1409. Transnational norm entrepreneurs can be internationally recognised individuals like Mahatma Gandhi or Nelson Mandela, or INGOs such as Amnesty International.

⁶¹ Koh, ‘Bringing International Law Home’, above n 52, 647-8.

⁶² Koh, above n 51, 1410.

⁶³ Ibid.

⁶⁴ Koh, ‘Bringing International Law Home’, above n 52, 648.

⁶⁵ Koh, above n 51, 1410.

and NGOs.⁶⁶ Koh writes, '[t]ogether, these law-declaring fora create an "interpretive community" capable of receiving a challenge to a nation's international conduct, then defining, elaborating, and testing the definition of particular norms and opining about their violation.'⁶⁷ Interpretative communities promote TLP by making the abstract norms of international law more suitable for practical use.

The final step of TLP is internalisation, the most important stage leading to obedience. Koh sees that states respond to the rulings of legitimate interpretive communities by adopting symbolic structures, laws and other mechanisms.⁶⁸ Although this is a shallow compliance, it is a significant step because repeated compliance with international norms will lead to habitual obedience.⁶⁹ As Koh views, an executive government is a driver of this transformative process. He writes:

Within national governments, in-house legal advisors exercise institutional mandates to ensure that the government's policies conform to international legal standards that have become embedded in domestic law. ...These legal advisers often operate within an internalised system of bureaucratic precedent, which may have a considerable measure of *stare decisis* effect. ...In making decisions, government leaders consult these internal legal standards. Over time, legal ideologies come to prevail among domestic decision makers so that they become personally affected by public perceptions that their actions are or will be perceived as unlawful, even in crisis situations. ...[D]omestic decision makers thereby become "enmeshed" with international legal norms, because institutional arrangements for the making and maintenance of an international law norm become entrenched in domestic legal and political processes. ...Finally, internalization is promoted when strong process linkages exist across issue areas. ...Because international legal obligations tend to be closely interconnected, deviation from international commitments in one area tends to lead noncompliant nations into vicious cycles of treaty violations. ...When a nation deviates from that pattern of presumptive compliance, frictions are created, not just in the particular issue area..., but in the whole spectrum of interlinked issue areas. To avoid such frictions in its continuing interactions, a nation's bureaucracies gain powerful institutional incentives to press their governmental leaders to adhere generally to policies of compliance over policies of violation.⁷⁰

Moreover, Koh recognises that the other two arms of a state's governance, the legislature and the judiciary, can also contribute to value transformation inside a state.

⁶⁶ Ibid.

⁶⁷ Koh, 'Bringing International Law Home', above n 52, 650 (footnote omitted).

⁶⁸ Ibid 652.

⁶⁹ Koh, above n 51, 1411.

⁷⁰ Koh, 'Bringing International Law Home', above n 52, 652-55 (footnote omitted).

He defines that '[l]egislative internalization occurs when international legal norms are embedded into constitutional norms or binding domestic legislation that officials of a noncomplying government must obey as part of the domestic legal fabric,'⁷¹ whereas 'judicial internalization occurs when litigation in domestic courts provokes judicial incorporation of international legal norms into domestic law, statutes, or constitutional norms.'⁷² However, Koh does not elaborate the process of legislative and judicial internalisation and how these forms of norm internalisation may interact with executive internalisation, which he emphasises.

In addition to legal internalisation,⁷³ Koh identifies two other types of internalisation, political and social. He explains that 'social internalisation occurs when a norm acquires much public legitimacy, so that a widespread adherence is observed,'⁷⁴ and political internalisation occurs, 'when national political elites accept a norm and advocate for its adoption as a matter of government policy.'⁷⁵ Although these two types of processes seem to be pointing to non-legal consequences from human rights treaties, Koh does not explicate their substance clearly. For example, the theory is not clear about how these processes actually occur, in what relationships the two processes exist with legal internalisation or how the three processes interact.

In contrast to the focus of the instrumentalist approach on norm implementation, the TLP theory usefully identifies the cultural or value-changing effects of human rights treaties. The theory's processual explanation of treaty implementation is also important, given an imaginary invocation of the instrumentalist approach — states parties either comply with treaty norms or not. Nonetheless, the TLP theory is still bound up with legalistic and state-centric explanations of treaty implementation. Koh identifies the obedience — a state of being that the treaty values are internalised — as a form of norm enforcement. Koh recognises the role that non-state actors play in enforcement of human rights law in the initial two phases of the TLP. However, these actors have little role in the most important third phase — the obedience. Instead, the third step is imagined to be largely a bureaucratic process, where the executive government is a critical player.

⁷¹ Koh, above n 51, 1413.

⁷² Ibid.

⁷³ Executive, legislative and judicial internalisation are forms of legal internalisation.

⁷⁴ Ibid.

⁷⁵ Ibid.

B *Domestic political mobilisation theory*

In the similar vein as liberal theorists of international relations,⁷⁶ political scientist Beth Simmons explains the effectiveness of human rights treaties in relation to the political regime of a country.⁷⁷ Simmons argues that ‘treaties are causally meaningful to the extent that they empower individuals, groups, or parts of the state with different rights preferences that were not empowered to the same extent in the absence of the treaties.’⁷⁸ Nonetheless, political mobilisation is successful if civil society actors have means and motives to demand their human rights.⁷⁹ In established democracies, civil society actors do not have much appetite to mobilise for their rights as human rights treaties merely repeat what they already have either in practice or in law. In stable autocracies, civil society actors are often controlled through intimidation and persecution and therefore do not have means to mobilise their rights. As such, according to Simmons, human rights treaties have the strongest effects on new democracies or softer autocracies.⁸⁰

Simmons regards civil society actors as strategic players who rationalise the success of their mobilisation in consideration of two conditions: (1) values that people place on the rights in question and (2) the chance of success.⁸¹ Under these conditions, treaty ratification is likely to stimulate political mobilisation by enhancing its chances of success.⁸² First, ratification of human rights treaties pre-commits a government to be receptive to the demands of civil society actors through the incurring of a domestic political cost when the government is derailed from its commitment.⁸³ Second, as a form of law, ‘ratified treaties are more likely than international norms or treaties the government has rejected to engage the interest of lawyers.’⁸⁴ Legal professionals can

⁷⁶ See, eg, Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51(4) *International Organization* 513.

⁷⁷ Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009).

⁷⁸ *Ibid* 125.

⁷⁹ *Ibid*.

⁸⁰ *Ibid* 360.

⁸¹ *Ibid* 136.

⁸² *Ibid* 126.

⁸³ *Ibid* 144-6.

⁸⁴ *Ibid* 146.

debate, publicise and interpret treaty norms and spark public interest on the issue. Lawyers may also lend their professional expertise to the nascent rights movement.⁸⁵

Third, treaty ratification provides a few intangible resources to political mobilisation.⁸⁶ The most important such resource is legitimacy, which empowers political actors and strengthens their claims. Human rights treaties also provide benchmarks, focal points and models to realise the demands of people.⁸⁷ As a benchmark, treaties provide standards against which both demands of people and government actions can be assessed. The treaty provides reassurance to citizens that their rights demands are reasonable, making them more willing to mobilise. As a focal point, a ratified treaty can help to coordinate and prioritise the efforts of the coalition.⁸⁸ Furthermore, ratified treaties become models for domestic legislation. Finally, treaty ratification can expand the range of strategies available to civil society actors.⁸⁹ For example, it enables political actors to mobilise a law through litigation. Simmons writes ‘litigation is a political strategy, which is often used strategically not only to win cases, but also to publicise and mobilise a cause.’⁹⁰

Additionally, Simmons identifies a number of functions that human rights treaties can perform. For example, treaties can directly affect the government agenda.⁹¹ In countries that are generally supportive of human rights, treaty ratification affects the policy options of a government by shifting rights reform to a higher position on the national agenda.⁹² The judiciary can also give direct effect to ratified treaties either by establishing precedents or ordering the adoption of implementing legislation.⁹³ Furthermore, human rights treaties have several existential values that are ‘unrelated to ratification *per se*.’⁹⁴ Human rights treaties could change global conceptions of what constitutes the appropriate behaviour of a modern government toward its people.⁹⁵ The treaties could also have anticipatory effects, as many governments aim to comply before

⁸⁵ Ibid.

⁸⁶ Ibid 146.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid 127-9.

⁹² Ibid 128.

⁹³ Ibid 129-35.

⁹⁴ Ibid 364.

⁹⁵ Ibid.

ratification.⁹⁶ Human rights treaties can also mobilise international assistance, which can be a critical aid to support domestic political mobilisation.⁹⁷

The instrumentalist view assumes a straightforward process of implementation where the treaty norms are ‘downloaded’ from international law into domestic legal systems and then are implemented, practically achieving human rights changes. In contrast, by highlighting a political function of human rights treaties, the domestic political mobilisation theory suggests that an indirect, political process enables a human rights change.⁹⁸ Simmons also dismantles the conventional understanding of international law and the international relations of a state as a homogenous entity, reminding us that the state is constitutive of various actors with different rights preferences. As such, Simmons recommends that a treaty implementation strategy needs an improved understanding of history, governing institutions and culture in domestic contexts.⁹⁹

Nonetheless, the domestic mobilisation theory is beset with instrumentalist thinking. The theory strongly emphasises technical legal elements of human rights treaties as the engine of change. For example, Simmons writes:

This research has focused not only on treaty existence, but on treaty *ratification* [emphasis in original], more specifically. I have argued that ratification stimulates groups to form, to organise and to make their views known as a government begins to implement the agreement (or not). Ratification debates give rise to publicity that encourages interested citizens and their advocates to think about, strategize, and articulate demands for compliance. Ratification creates an obligation on the part of the States party to report to an oversight committee, and the act of reporting provokes shadow reports by groups, even if the government itself would prefer to submit a whitewash.¹⁰⁰

Here, treaty ratification is seen as the critical moment in triggering domestic rights mobilisation. While engaging in domestic campaigns for the ratifications of various international treaties in Mongolia, I have seen that domestic mobilisation on a certain rights issue can spark before a country ratifies a treaty. In fact, I have seen that, in the

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Some quantitative research that I discussed in the previous part, such that of Eric Neumeyer and Hafner-Burton and Tsutsui, also identify a political function of human rights treaties.

⁹⁹ Simmons writes, ‘[a]ttention should instead be focused on supporting ratification in those countries in which the agreements are likely eventually to matter most. To know which countries these are, it is crucial to understand their history, governing institutions and culture.’ See Simmons, above n 77, 376.

¹⁰⁰ Ibid 364.

course of campaigns for ratification of human rights treaties, domestic political actors went through significant changes. Treaty ratification can be a critical moment, especially for enabling judicial application of human rights treaties. Yet, it is not the only way that treaties can influence the domestic political landscape.

The theory is pervaded by an assumption of treaties as international hard law creating obligations on a state and introducing new rules to a domestic legal order. For example, Simmons observes that international human rights law is comprised of custom and treaty law (excluding soft law), and considers which of these two sources of obligation are likely to have the strongest positive impact on actual practices.¹⁰¹ Yet, evidence suggests that countries do not always distinguish between hard and soft international laws for implementation.¹⁰² Simmons also writes, ‘treaties and the question of their ratification exogenously introduce a new issue into domestic politics that, but for its international provenance, would not have been on the national agenda at that point in time or possibly at all.’¹⁰³

Such a strong focus on the novelty of international human rights treaties seems problematic. As I will show in the case of the *Disabilities Convention* in Chapter Four, human rights treaties are usually preceded by non-binding instruments, which treaty norms resemble to a large extent, but that may differ in their underlying philosophy. I will also demonstrate in Chapters Five and Seven that non-binding predecessors of the *Disabilities Convention*, although differing from the latter in their philosophy, had some impact in the laws of Australia and Mongolia, bending them in a similar direction as the *Convention*. Complicating the scenario, Chapter Four will indicate that the *Disabilities Convention* and its predecessors drew on domestic and regional laws. Thus human rights treaty norms are not always novel in domestic contexts.

¹⁰¹ Ibid (footnote omitted). Simmons writes:

While international customs can have a direct effect even without implementing legislation, particularly in some common law countries, it would be much harder to mobilise domestic audience to demand implementation of international custom than a ratified treaty. The act of a government committing in a quite public way to explicit legal provisions is central to the domestic mechanisms discussed in this book. Ratification of a treaty provides at least the color of local ownership of specific human rights obligations.

¹⁰² See Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000); Hilary Charlesworth and Christine Chinkin, ‘Regulatory Frameworks in International Law’ in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 246.

¹⁰³ Simmons, above n 77, 356.

Finally, although Simmons suggests the importance of closely attending to domestic contexts, her theory seems to perpetuate a fixed image of domestic politics — the war between a reluctant government and strategic civil society actors. In contrast, Sally Merry shows that local activists often use pragmatic, dialogic approaches to localise human rights ideas in the case of the five countries that she studied.¹⁰⁴ David Forsythe too writes that NGOs can sometimes be shown to have had a direct, positive effect on human rights, but often their impact combines with other factors such as media and government action, in a way that the independent causal weight of NGOs is not known.¹⁰⁵ These arguments indicate the importance of systematic and contextual evidence in illuminating the dynamics of domestic rights politics, which Simmons's theory lacks.

C *Transnational activist networks theory*

In the mid-1990s, scholars of international relations Thomas Risse, Stephen Ropp and Kathryn Sikkink embarked on an ambitious project to theorise human rights change and proposed a widely acclaimed theory of transnational activist networks, as a result.¹⁰⁶ The theory was initially published in 1998, and substantively revised in 2013.¹⁰⁷ Like Simmons, Risse et al highlight the political function of treaties, and argue that 'human rights norms influence political change through a socialisation process that combines instrumental interests, material pressures, argumentation, persuasion, institutionalisation and habitualisation.'¹⁰⁸ The original theory stresses transnational activists' networks for human rights change. Risse et al argue that 'the diffusion of international norms in the human rights area crucially depends on the establishment and the sustainability of

¹⁰⁴ Merry, above n 38, 180.

¹⁰⁵ See David P. Forsythe, *Human Rights in International Relations* (Cambridge University Press, 2nd ed 2006) 200-6.

¹⁰⁶ Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 2. Risse et al write 'we develop and present a theory of the stages and mechanisms through which international norms can lead to changes in behaviour.'

¹⁰⁷ Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2013).

¹⁰⁸ Risse et al, above n 106, 37.

networks among domestic and transnational actors who manage to link up with international regimes, to alert Western public opinion and Western governments.’¹⁰⁹

Transnational activist networks can help in constituting necessary conditions for sustainable human rights change in three main ways. First, they put an oppressive government on the international agenda.¹¹⁰ At the same time, they remind liberal states about their own identity as promoters of human rights and enrol them into their efforts. Second, transnational activists can empower and legitimise the claims of domestic oppositions against oppressive governments, and protect nascent domestic groups from government repression.¹¹¹ Third, these actors challenge the oppressive government by creating a transnational structure that puts pressure on the government ‘from above’ and ‘from below.’¹¹²

Risse et al argue that international norms are internalised and implemented domestically through the process of norm socialisation.¹¹³ The norm socialisation process encompasses three types of what these scholars call ‘causal mechanisms’ including instrumental adaptation and strategic bargaining; moral consciousness-raising, argumentation, dialogue, and persuasion; institutionalisation and habitualisation.¹¹⁴ The process of norm socialisation has five stages, which take place in a spiral-like way. The first stage of the spiral model assumes a repressive state, whose conduct alerts and activates transnational activist networks.¹¹⁵ In this stage, domestic civil society is presumed to be too weak or oppressed to meaningfully challenge the government and, therefore, transnational activists are crucial in bringing the oppressive state to the attention of the international community. Transnational networks are most often activated as a result of massive human rights violations such as a massacre. Then, these actors alert Western governments and publics to join networks to change human rights

¹⁰⁹ Ibid 5. Transnational actors are defined as ‘relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchange of information and service.’ Ibid 18.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid. These processes are ideal types, but, in reality, they usually take place simultaneously. The significance of each process varies with different stages of the socialisation process. Generally, instrumental adaptation usually prevails in early stages of norm socialisation. Later, argumentation, persuasion and dialogue become more significant, while institutionalisation and habitualisation mark the final steps in the socialisation processes. See also ibid 11-7.

¹¹⁵ Ibid 22.

practice in the target state. The first step succeeds if transnational activists are able to gather sufficient information regarding the repression of the target state.

The second stage is denial, where the mobilisation of the international community confronts a refusal of the oppressive government to accept human rights norms.¹¹⁶ Often repressive governments deny the validity of human rights norms as interference in their internal affairs, but they are at least implicitly aware that they face a problem in terms of their international reputation.¹¹⁷ Although this stage can last long without any concrete actions and may appear to be counterproductive, the denial is still a positive response as it compels the repressive state to engage in dialogue, even if that dialogue is of a limited nature. At this stage, international efforts to socialise the repressive regime are often complemented by material inducements that are conditional on human rights performances. To the extent that the target state values its membership in the community of liberal states and to the extent that the state receives large military and economic aid, it will be more vulnerable to human rights pressure than a state that does not depend on those conditions.¹¹⁸

The third stage will come if, in response to the efforts of transnational activists, an oppressive government makes tactical concessions such as releasing political prisoners.¹¹⁹ Although such actions are often strategic, trying to use concessions to regain military or economic assistance or to lessen international isolation, they can trigger domestic civil society actors to gain courage to criticise their government. Transnational activists can also help, creating a space to amplify their demands in the international arena. At this stage, domestic actors are relatively small and dependent on a handful of key leaders, and thus prone to a government's intimidation and oppression. In such conditions, transnational activist networks can shield domestic actors.

As the norm-violating state makes tactical concessions, the focus of activities shifts from the transnational to the domestic level.¹²⁰ Yet, this is the most precarious phase of the spiral model, 'since it might move the process forward toward enduring change in

¹¹⁶ Ibid 22-4.

¹¹⁷ Ibid 24.

¹¹⁸ Ibid.

¹¹⁹ Ibid 25.

¹²⁰ Ibid.

human rights conditions, but can also result in backlash.¹²¹ For example, arresting and killing key leaders of domestic civil society decapitates and paralyses the movement. However, such oppression rarely suspends the spiral change; rather, it mostly delays the change, because additional repression is costly for an oppressive government in terms of its domestic legitimacy.¹²² In this phase, human rights norms are likely to serve as the main principled idea around which an opposition can be formed.¹²³

Such condition is often formed not because those domestic actors truly believe in the principles of human rights, but rather because their legitimacy and international support make them an easy tool to criticise the conduct of oppressive governments. At the same time, the oppressive government is trapped by its own rhetoric and finds it hard to retreat from human rights promises made strategically. Risse et al write, ‘...a process which began for instrumental reasons with argument being used merely rhetorically, increasingly become true dialogue over specific human rights allegations in the “target state”.’¹²⁴ Faced with a fully mobilised domestic opposition that is linked up with transnational networks, an oppressive government no longer has any choice but to allow a controlled liberalisation.¹²⁵

The fourth stage of spiral change is prescriptive status, where ‘the actors involved regularly refer to human rights norms to describe and comment on their own behaviour and that of others; the validity of claims of the norm are no longer controversial, even if the actual behaviour continues violating the rules.’¹²⁶ The indicators of prescriptive status include: (1) the oppressive state ratifies human rights treaties including their optional protocols; (2) the norms are institutionalised in the constitution and domestic laws; (3) there is some institutionalised mechanism for citizens to complain about human rights violations; and (4) the discursive practices of the government acknowledge the validity of human rights norms and engage in a dialogue with their

¹²¹ Ibid.

¹²² Ibid 26.

¹²³ Ibid.

¹²⁴ Ibid 28.

¹²⁵ Ibid.

¹²⁶ Ibid 29 (citation omitted).

critics.¹²⁷ A prevailing communicative behaviour between actors in this stage is dialogue, argumentation and justification, rather than pressure and coercion.¹²⁸

The prescriptive status then leads to a rule consistent behaviour, the fifth stage of the spiral change.¹²⁹ This is a delicate stage, because decreased human rights violation in the target state may also reduce international attention. Risse et al argue that, in any case, sustainable change in human rights conditions will only be achieved when national governments are continuously pushed to live up to their claims and when the pressure ‘from below’ and ‘from above’ remains.¹³⁰ They write:

Only then can the final stage in the socialisation process be reached, whereby international human rights norms are fully institutionalized domestically and norm compliance becomes a habitual practice of actors and is enforced by the rule of law. At this point, we can safely assume that the human rights norms are internalised.¹³¹

The original theory of Risse et al rests on particular conditions, the existence of the international community and the oppressive government that has control over its territory and population. It also describes a linear process towards human rights norm compliance, where domestic change is inevitable. The updated version addresses some criticisms of the original theory,¹³² and attempts to clarify ‘the main social mechanisms through which human rights change occurs and the scope of conditions that affect such change, and signal under what conditions we would expect spirals of external and internal pressures to be more or less effective.’¹³³

¹²⁷ Ibid.

¹²⁸ Ibid 30.

¹²⁹ Ibid 31-5.

¹³⁰ Ibid 33.

¹³¹ Ibid.

¹³² Risse, Ropp and Sikkink, above n 107, 276. Regarding the limitations of their original theory, Risse et al write:

First, we underspecified the process and scope conditions by which and under which states as well as private actors could be moved from commitment to human rights norms to actual compliance with them. Second, our earlier work assumed the presence of fully functioning states, suggesting that compliance with human rights norms was a matter of state commitment and willingness rather than of institutional capacity. ...Finally, we did not look at compliance with human rights norms by powerful states.

Ibid 4.

¹³³ Ibid 10.

In particular, Risse et al consider several scope conditions such as political regime type, degree of statehood (ability of a central government to control the whole territory), material vulnerability (economic and military potential of a country), and social vulnerability (actors' desire to be a part of an international community), and four types of social mechanisms, including coercion (use of force and legal enforcement), incentives (sanctions and rewards), persuasion (discourse, and naming and shaming) and capacity building (institution building, education and training).¹³⁴ As a result, Risse et al claim that domestic contexts determine which social mechanism is likely to secure the compliance with human rights norms in that context.¹³⁵ They write:

[M]ultiple mechanisms are necessary because human rights compliance involves multiple actors, and those actors have different kinds of motivations. ... We suggest that different policy responses may be necessary for actors who are willing, but unable to bring about compliance than for actors who are unwilling to do so.¹³⁶

The updated version abandons the theory's focus on transnational actors and actions, but highlights the centrality of domestic contexts and domestic political actors. Like Beth Simmons, Risse et al claim that '[t]he single most important factor for sustained state willingness to comply with human rights norm is regime type,'¹³⁷ and human rights improvements go hand-in-hand with democratisation processes and democracies are more likely to comply with human rights norms than autocracies.¹³⁸ Risse et al write:

Ultimately, human rights change begins at home with a build-up of domestic pressures. In the final analysis, persistent and sustained human rights change depends on mobilised groups in domestic civil society pressuring for greater democracy and using the space provided by democratic institutions to vigilantly defend and protect these rights.¹³⁹

¹³⁴ Ibid.

¹³⁵ Ibid 286-93.

¹³⁶ Ibid 276.

¹³⁷ Ibid 287.

¹³⁸ Ibid 16. See also, ibid 295. Risse et al write:

[O]ne would expect that legal enforcement of human rights through domestic, foreign or international courts would bring democracies back into compliance. Moreover, one would also assume that mechanisms of persuasion, naming and shaming are particularly effective with regard to stable democratic regimes given that respect for human rights constitutes an institutionalised logic of appropriateness in such systems.

¹³⁹ Ibid 295.

The transnational activist network theory is an important attempt to illustrate political actions in bringing about human rights change with the aid of international law. In contrast to the transnational legal process theory, which approaches the process in terms of norm enforcement, transnational activist network theory perceives human rights norms as instruments of a political process. Still, however, legalistic and state-centric explanations are beset with the theory. For example, the tactical concession phase is essentially about the oppressive state incorporating international human rights norms in its domestic legal order and making institutional arrangements as pressured by transnational and domestic actors. The fifth stage of the spiral process that is called rule consistent behaviour is not articulated in detail; but it seems to rely on the rule of law as the engine of local change. Risse et al point out, in the fifth stage, ‘norm compliance becomes a habitual practice of actors and is enforced by the rule of law.’¹⁴⁰

Nonetheless, in the revised version of the transnational activist networks theory, Risse et al retreat from their ambition to propose a general theory of domestic human rights change¹⁴¹ and suggest that scholarship explore domestic contexts more deeply and understand social mechanisms relevant to that context. I will return to this point in Chapter Ten.

D *State socialisation theory*

The state socialisation theory proposed by legal scholars Ryan Goodman and Derek Jinks is another influential theoretical strand in human rights scholarship.¹⁴² The theory starts by questioning: ‘*why do human rights practices not seem to change visibly, although we see almost universal ratification of treaties as well as widespread domestic legal and institutional isomorphism in the area across the world countries?*’¹⁴³ Goodman and Jinks argue that state behaviour is changed not because states are persuaded by the truth, validity or appropriateness of norms; states change mainly

¹⁴⁰ Risse et al, above n 106, 33.

¹⁴¹ In the original theory, Risse et al claim that ‘...the model is generalizable across cases irrespective of cultural, political, or economic differences among countries. These differences matter in terms of timing and duration of socialization processes; but they do not affect the overall validity of our explanatory model.’ Ibid 6.

¹⁴² Ryan Goodman and Derek Jinks, ‘How to Influence States: Socialization and International Human Rights Law?’ (2004) 54 *Duke Law Journal* 621; Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford University Press, 2013).

¹⁴³ Goodman and Jinks, *Socialising States*, above n 142, 60-68.

because they feel internal and external pressures that come out of their willingness to fit into a club of civilised states.¹⁴⁴ To them, a distinct social mechanism — acculturation — explains states' shallow conformity with human rights norms. Acculturation is defined as the process through which 'states adopt the beliefs and behavioural patterns of surrounding cultures without actively assessing either the merits of those beliefs and behaviours, or the material costs and benefits of conforming to them'.¹⁴⁵

Acculturation is neither persuasion, nor pressure — it is a middle ground between these two widely known social mechanisms of influence.¹⁴⁶ Material rewards and punishment drive pressure and pressure then leads to norm compliance through instrumental calculation.¹⁴⁷ The extent that a norm accords with internal values of actors (in this case, states) drives persuasion and persuasion achieves norm acceptance that occurs through active assessment of the value and validity of a rule.¹⁴⁸ Unlike pressure and persuasion, acculturation is driven by social expectations or cultural identity.¹⁴⁹ Acculturation leads to norm conformity, achieved through conscious and unconscious assessment of social role and status, as well as mimicry.¹⁵⁰ Thus, according to Goodman and Jinks, acculturation explains a growing legal and institutional isomorphism across countries in areas of the protection of civil and political rights, welfare and labour policy, education, democracy, children's rights, women's rights, LGBT rights, establishment of national human rights institutions, or similarity of constitutional design.

A state's recognition of a shared identity with other states, which generates pressure to conform to the behavioural patterns of that group, induces acculturation. 'Acculturation is propelled by cognitive pressure,' write Goodman and Jinks, 'actors in several respects are driven to conform.'¹⁵¹ Driven by cognitive pressure, a state calculates social cost and benefits, which do not always overlap with the material costs and benefits.¹⁵² States sometimes engage in materially costly behaviour to secure or to improve their social

¹⁴⁴ Ibid 25-32.

¹⁴⁵ Ibid 4.

¹⁴⁶ Ibid 27. See especially, ibid 33, table 2(1).

¹⁴⁷ Ibid 23.

¹⁴⁸ Ibid 24.

¹⁴⁹ Ibid 25.

¹⁵⁰ Ibid 28-32.

¹⁵¹ Ibid 27.

¹⁵² Ibid 31. Goodman and Jinks write, 'social cost and benefits cannot be reduced to the material cost and benefit; because they, in certain circumstances, define state's behaviour regardless of the material considerations.'

standing.¹⁵³ Likewise, states also refuse to join a group with which they do not identify themselves, even if the membership would provide significant material benefits.¹⁵⁴

Goodman and Jinks explain that a distinct social pressure generated by acculturation encompasses external and internal aspects.¹⁵⁵ The internal pressures include the social-psychological costs of nonconformity (such as dissonance associated with conduct that is inconsistent with an actor's identity or social roles) and social-psychological benefits of conforming to group norms and expectations (such as cognitive comfort).¹⁵⁶ External pressures include the imposition of social-psychological costs through naming and shaming and the conferral of social-psychological benefits through displays of public approval.¹⁵⁷ Therefore, as these scholars argue, states adopt practically irrelevant legal and institutional models into their domestic systems without seriously assessing their implications as they are often acculturated and mimic the preferred community of states.

State socialisation theory focuses on identifying a social mechanism through which human rights norms are adopted domestically. Thus, the theory explains a little about domestic processes occurring in response to thereby adopted norms. Goodman and Jinks argue that, since international norms are adopted in the domestic legal order through acculturation, they often create an implementation gap between commitment and practice.¹⁵⁸ Nonetheless, as they predict, such a gap will narrow over time. Drawing on theories of political science and sociology, Goodman and Jinks point out three potential ways that adopted human rights norms and institutions could eventually change domestic contexts. First, these scholars agree with the claims of domestic political mobilisation and transnational activist network theories, and argue that officially adopted models affect domestic political opportunity structures that prompt a citizen's political mobilisation.¹⁵⁹ Second, Goodman and Jinks see that the domesticated institutions may learn the proper functionalities over time¹⁶⁰

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid 27-28.

¹⁵⁶ Ibid 27.

¹⁵⁷ Ibid 28.

¹⁵⁸ Ibid 144.

¹⁵⁹ Ibid 144-150. Goodman and Jinks explain that the timing and fate of social movements are largely dependent on the opportunities afforded. The political opportunity structure consists of four elements including (1) relative openness of the institutionalised political system; (2) stability of elite alignments

Third, acculturated norms and institutions may directly impact on politicians and public officials, which Goodman and Jinks call the ‘civilising force of hypocrisy.’¹⁶¹ Such effects can have two sides, external and internal. The external side is government officials’ own recognition that the public will demand consistency in their official commitments.¹⁶² It is an internally felt pressure that is borne out of a consideration of an external factor. Civil society actors may calculate this condition and harness it.¹⁶³ These scholars write that ‘by resorting to the officially endorsed values, the concerned individuals are likelier to find allies in government and to divide political elites who would otherwise more uniformly oppose their claims.’¹⁶⁴ The internal side of the ‘civilising force of hypocrisy’ refers to a setting where public officials come to believe their own public rhetoric and position.¹⁶⁵ According to Goodman and Jinks, the same logic can also apply in organisational settings. They write, ‘especially in bureaucratic institutions, when authorities pronounce agenda for action, even if initially promulgated as a pretext to serve other interests, administrative agents tend to accept these new commitments and filter out incompatible beliefs or ideas.’¹⁶⁶

State socialisation theory informs international legal scholarship that is otherwise polarised between power and interest-based explanations, and the rule legitimacy based explanations of norm implementation, about the world community’s influence on states’ behaviour, suggesting that international human rights norms can be complied with in the absence of enforcement. Nonetheless, the theory is built on an assumption of treaties as global legal rules. Jutta Brunnée and Stephen Toope note:

...[T]hey [Goodman and Jinks] too take legal obligation (specifically formal legal obligation) for granted and do not inquire into its nature and effects. Instead, their focus is on ‘the social mechanisms of law’s influence.’¹⁶⁷
...We are not convinced by this approach, which appear to rely on an

supporting the polity; (3) presence of elite allies for a given movement or issue; and (4) a state’s capacity and propensity for repression. A change in any one element can independently inspire social groups to mobilise. Ibid 146.

¹⁶⁰ Ibid 156-157.

¹⁶¹ Ibid 150-154.

¹⁶² Ibid 150.

¹⁶³ Ibid 151.

¹⁶⁴ Ibid 152.

¹⁶⁵ Ibid 153.

¹⁶⁶ Ibid.

¹⁶⁷ Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010) 106.

extremely thin, formal concept of law...¹⁶⁸ Goodman and Jinks's model may have merit when international norms exist only in a formal sense.¹⁶⁹

State socialisation theory assumes a direct causal relationship between treaty ratifications and legal and institutional developments communicating a belief that the former caused the latter. The theory also has a little consideration of domestic contexts, simply predicting that '[s]purred by the official adoption of an internationally legitimated human rights model, they [acculturated legal and institutional adoptions] make change in the direction of the model much more likely.'¹⁷⁰

IV CONCLUSION

Human rights scholarship is replete with instrumentalist explanations about the nature and effects of the treaties. The scholarship often approaches human rights treaties as global laws regulating domestic contexts through what they have prescribed. Informed by such understanding, quantitative studies in the area of scholarship seek to measure the direct effects of treaty norms on the basis of differences before and after treaty ratification or comparing between treaty ratifiers and non-ratifiers. Mostly arriving at pessimistic results, this type of research commonly suggests that increased coercive power is a crucial ingredient for a better human rights regime.

In comparison to quantitative studies, qualitative theories explaining the mechanisms of human rights change provide richer accounts of the impact and function of the treaties. Transnational legal process theory identifies a cultural or a value changing effect of treaties. State socialisation theory points out the world community's influence in achieving human rights compliance. These theories provide conceptual frameworks to question the centrality of enforcement in implementing human rights treaties. The domestic political mobilisation theory and the transnational activist network theory also challenge a straightforward narrative of treaty implementation changing domestic contexts through legal and institutional diffusion. Instead, these theories identify non-state actors and ensuing political processes in a human rights change, suggesting an indirect way that the treaties may affect domestic contexts.

¹⁶⁸ Ibid 107.

¹⁶⁹ Ibid.

¹⁷⁰ Goodman and Jinks, *Socialising States*, above n 142, 144.

Nonetheless, framing and processual explanations of these theories too are ingrained in the culture of human rights instrumentalism. All the theorists discussed in this Chapter, Koh, and Goodman and Jinks strongly, and Simmons and Risse et al to a lesser degree, suggest that the processes that they theorise would ultimately achieve treaty implementation. Koh defines obedience—the state of being where treaty values are internalised within states—as a form of norm enforcement. Goodman and Jinks too view that acculturation leads to norm compliance. In a similar way, Risse et al argue that states are socialised through human rights norms and, in turn, state socialisation ensures that norm compliance. Simmons, although recognising that the effectiveness of human rights norms depends on the extent that domestic political actors place value on the issue in question, writes that domestic actors mobilise for human rights treaties, seemingly suggesting that treaty implementation would be a desired end result for a political mobilisation.¹⁷¹

The processual explanations of these theories merit a scrutiny. The transnational legal process occurs essentially through norm diffusion, where government bureaucrats and lawyers play central roles. State socialisation theory too does not question the standard explanation, endorsing that states' formal acceptance of human rights treaties creates legal and institutional isomorphism across the countries. In a similar vein, domestic mobilisation and transnational activist network theories assume that only ratified treaties influence domestic politics. To Beth Simmons, it is the point where civil society actors wake up and calculate their potential for success. For Risse et al, upon treaty ratification, a repressive government makes a tactical concession and allows international law to penetrate into its domestic sphere.

Moreover, because of their instrumentalist focus, the four influential theories that I examined pay little attention to domestic contexts, somehow suggesting that human rights change is inevitable once treaties are incorporated into domestic legal orders. In contrast, the research of Heyns and Viljeon and Merry provide grounded evidence from various domestic contexts, demonstrating the complex ways that international human rights interventions interact with local circumstances. Human rights scholarship needs a

¹⁷¹ See Simmons, above n 77, 136. Simmons defines domestic political actors as strategic players, who rationalise the success of their mobilisation in consideration of values that they place on the rights in question and the chance of success.

Chapter TWO

nuanced approach to reveal the complex interactions between international human rights law and domestic contexts.

CHAPTER THREE THE DISABILITIES CONVENTION

I INTRODUCTION

On 19 December 2001, on the proposal of the Mexican government, the UN General Assembly adopted a resolution establishing an Ad Hoc Committee ‘to consider the proposals for a comprehensive and integral international convention to protect and promote the rights and dignity of persons with disabilities...’¹ The Ad Hoc Committee held its first session from 29 July to 9 August 2002. The treaty was then negotiated over eight sessions and drafting was completed in August 2006. On 13 December 2006, the UN General Assembly adopted the *Disabilities Convention* and the *Optional Protocol* by consensus.² The treaties opened for signature on 30 March 2007, and entered into force on 3 May 2008. As of May 2017, the *Convention* had 173 ratifications (or accessions) and 10 signatories,³ whereas the *Optional Protocol* had 92 ratifications and 28 signatories.⁴ According to the UN Secretary-General, the *Convention* was ‘the most rapidly negotiated human rights treaty in the history of international law; and the first to emerge from lobbying conducted extensively through the Internet.’⁵ The *Disabilities Convention* also is amongst the most quickly entered into force of the human rights treaties, only preceded by the *CRC*.

This Chapter, together with Chapter Four, explores the nature and purposes of this widely supported treaty. To this end, the current chapter introduces the *Convention’s* text in two main parts. Part II provides an overview of the *Convention* norms and discusses their instrumental purposes: to translate the existing human rights norms in

¹ *Comprehensive and Integral Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities*, G.A. Res 56/168, U.N. GAOR, 56th sess, 88th plen mtg, Agenda item 199 (b), Supp No 168, UN Doc A/RES/56/168 (26 February 2002) (*GA Resolution 56/168*).

² *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN GAOR, 61st sess, 76th plen mtg, Agenda Item 67(b), UN Doc A/RES/61/106 (13 December 2006).

³ UN Office of the High Commissioner for Human Rights, *Ratification of the Convention on the Rights of Persons with Disabilities: Interactive Map* (17 July 2016) <http://www.ohchr.org/Documents/HRBodies/CRPD/OHCHR_Map_CRPD.pdf>. Signatories refer to the parties, who signed the instruments, but not ratified or accessed.

⁴ UN Office of the High Commissioner for Human Rights, *Ratification of the Optional Protocol to the Convention on the Rights of Persons with Disabilities: Interactive Map* (May 2017) <http://www.ohchr.org/Documents/HRBodies/CRPD/OHCHR_Map_CRPD-OP.pdf>.

⁵ UN Secretary-General, ‘Secretary-General hails adoption of a landmark convention on rights of persons with disabilities’ (Press release, SG/SM/10797-HR/4911-L/T/4400, 13 December 2006) <<http://www.un.org/press/en/2006/sgsm10797.doc.htm>>.

the context of disability and to clarify the means of implementing treaty norms. In doing so, the *Convention* extended the conceptual boundaries of international human rights law. Part II explains the innovative elements of the *Convention* and sheds light on the origins of those elements.

Human rights scholarship that I discussed in Chapter Two often focuses on the ‘norm-side’ of the treaties. Yet, there is also a ‘moral side’ for these treaties.⁶ Human rights treaties are underpinned by certain moral propositions drawing a distinct vision of human life and that propositions must guide efforts to implement treaty norms. The human rights approach to disability is such a moral proposition in the *Disabilities Convention*. Part III explicates the claims of the human rights approach to disability. To distinguish the human rights approach to disability from other comparable approaches informing modern disability laws and policies, Part III begins by providing an overview of a typology of disability legal entitlements proposed by Marcia Rioux. Part IV concludes by highlighting the explicit moral propositions underpinning human rights treaties that are largely overlooked in the scholarship in the area.

II THE NORMS OF THE CONVENTION

A *Scope, structure and rights*

The *Disabilities Convention* is designed to be a comprehensive treaty. The General Assembly mandate given to the Ad Hoc Committee was ‘to consider the proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities based on the holistic approach in works done in the fields of social development, human rights and non-discrimination.’⁷ According to Rosemary Kayess and Phillip French, the word ‘integral’ signalled an intention by the General Assembly to draft a core human rights treaty, rather than a subsidiary instrument to existing international law. The word ‘comprehensive’ signalled an instruction to take a holistic approach in the *Convention*’s drafting incorporating social

⁶ See, eg, Aaron X. Fellmeth, *Paradigm of International Human Rights Law* (Oxford University Press, 2016).

⁷ *GA Resolution 56/168* para 1.

development, human rights and non-discrimination elements.⁸ The proposed treaty was not to be a purely anti-discrimination Convention, as is the case for the *CERD* and *CEDAW*. Instead, the *CRC* was given as a model to follow.⁹ Signalling the intentions of the General Assembly, the words ‘comprehensive and integral’ were kept in the working title of the *Convention* until its adoption.¹⁰

The text of the *Disabilities Convention* consists of 25 preambular paragraphs and 50 articles. Although not binding in itself, the preamble provides insights into the drafters’ intentions in adopting the *Convention* and their understanding of the issues covered by the treaty. Therefore, it has important interpretative value.¹¹ The preamble stipulates the *Convention*’s understanding of disability as ‘...an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with other.’¹² Further, it recognises the diversity and intersectionality of disability,¹³ as well as the multiple forms of discrimination faced by some groups of people with disabilities.¹⁴ The preamble also recognises the importance of some measures in promoting and protecting the rights of persons with disabilities, such as international cooperation,¹⁵ involvement of people with disabilities in decision-making processes¹⁶ and accessibility to the physical, social, economic and cultural environment.¹⁷ Conditions necessitating the creation of the *Convention* can also be discerned from the preamble, which I will return in Chapter Four.

⁸ Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review* 1, 20.

⁹ Stefan Trömel, 'A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities' (2008) 1 *European Yearbook of Disability Law* 115, 118.

¹⁰ See General Assembly, *Interim report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its eighth session*, UN Doc A/AC.265/2006/4 (1 September 2006).

¹¹ See *Treaties Convention* arts 31-3. According to the *Treaties Convention*, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In establishing the object and purpose of a treaty, in the light of article 31(2), due regard must be given to preamble, annex and other supplementary instruments.

¹² *Disabilities Convention* Preamble para (e).

¹³ *Ibid* Preamble paras (i), (g), (s).

¹⁴ *Ibid* Preamble paras (p), (q), (r).

¹⁵ *Ibid* Preamble para (l).

¹⁶ *Ibid* Preamble para (o).

¹⁷ *Ibid* Preamble para (v).

The articles of the *Convention* vary in length, but, overall, they are ‘the densest exposition of human rights to date.’¹⁸ Article 1 sets out the purpose of the *Convention* as ‘to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity.’¹⁹ In this way, the *Convention* creates three levels of obligations for states parties — to promote (foster recognition), to protect (prevent interference with) and to ensure (enable the realisation of) the right recognised.²⁰

Article 1 defines people with disabilities as ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’²¹ However, the definition is not exhaustive, and it should be read in conjunction with the preamble.²² The *Convention* does not restrict its coverage to particular persons, but it identifies the basic characteristics of its beneficiaries, and recognises the relative nature of disability. Article 2 defines the key concepts of the treaty such as communication, language, disability discrimination, reasonable accommodation and universal design. Article 3 provides eight principles guiding the interpretation and implementation of the *Convention*.²³ Article 4 provides the general obligations of states parties. In line with other human rights treaties, it requires states parties to adopt legislative, administrative

¹⁸ Kayess and French, above n 8, 22.

¹⁹ *Disabilities Convention* art 1.

²⁰ Kayess and French, above n 8, 26.

²¹ *Disabilities Convention* art 1.

²² Ibid Preamble para (e). The preamble declares that ‘disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with other.’ Structurally, the definition of ‘people with disabilities’ is not placed under article 2, which provides for the key definitions of the *Convention*. It can be constructed that the reference to ‘includes’ in article 1 assures the open ending in the coverage of the *Convention*. See also Working Group of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, *Compilation of Proposals for Elements of a Convention: Part III Scope and Definitions* (5 January 2004)

<<http://www.un.org/esa/socdev/enable/rights/comp-element3.htm>>.

²³ *Disabilities Convention* art 3. These principles include (a) respect for inherent dignity, individual autonomy, including the freedom to make one’s own choices and independence of persons, (b) non-discrimination; (c) full and effective participation and inclusion in society; (d) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; (e) equality of opportunity; (f) accessibility; (g) equality between men and women and (h) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

and other measures to implement the *Convention* norms,²⁴ and to abolish or amend existing laws, regulations, customs and practices that discriminate against people with disabilities.²⁵ States parties are also obliged to adopt an inclusive approach in protecting and promoting the rights of people with disabilities,²⁶ and in ensuring that the public sector respects their rights.²⁷ The *Convention* also requires states parties to take measures to abolish discrimination against people with disabilities by persons, organisations and private enterprises.²⁸

Importantly also, the general obligations of the *Convention* extend beyond the traditional legalistic approach of international human rights law. The *Convention* obliges states parties to engage in research and development about accessible goods, services and technologies for people with disabilities and to enable others to undertake such research.²⁹ States parties are required to provide accessible information about assistive technology to persons with disabilities,³⁰ and promote professional and staff training on the *Convention* rights.³¹ Moreover, states parties have to consult with people with disabilities and their organisations, especially in decision-making concerning them.³² Insofar as the economic, social and cultural rights are concerned, states parties must take progressive measures to realise the protected rights to the maximum extent of their available resources.³³

Articles 5 and 6 recognise multiple discriminations that women and children with disabilities experience, and obligates state parties to implement the *Convention* rights in ways that are responsive to the unique circumstances of these population groups. Articles 8 and 9 are especially important in the treaty's context. Article 8 requires state parties to foster respect for the rights and dignity of people with disabilities and combat stereotypes and prejudice. Article 9 sets out the obligation of state parties to ensure that a social environment is accessible to people with disabilities. Articles 10 to 20

²⁴ Ibid art 4(1)(a).

²⁵ Ibid art 4(1)(b).

²⁶ Ibid art 4(1)(c).

²⁷ Ibid art 4(1)(d).

²⁸ Ibid art 4(1)(e).

²⁹ Ibid arts 4(1)(f), 4(1)(g).

³⁰ Ibid art 4(1)(h).

³¹ Ibid art 4(1)(i).

³² Ibid art 4(3).

³³ Ibid art 4(2).

enumerate substantive rights and freedoms, and set out specific obligations to implement those rights. These include the right to life,³⁴ liberty and security of the person,³⁵ freedom from torture,³⁶ freedom from exploitation, violence and abuse,³⁷ liberty of movement and nationality,³⁸ freedom of expression and opinion,³⁹ privacy,⁴⁰ respect for home and family,⁴¹ access to justice,⁴² legal capacity,⁴³ the rights to education,⁴⁴ employment,⁴⁵ adequate standard of living,⁴⁶ political participation,⁴⁷ and participation in cultural life, sports and recreation.⁴⁸ Additionally, the *Convention* protects several entitlements that are specific to the context of disability, including respect for physical and mental integrity,⁴⁹ and the rights to live independently and to be included in the community,⁵⁰ personal mobility,⁵¹ and rehabilitation.⁵²

The *Disabilities Convention* is focused on specifying the means of implementing the protected rights. Articles 31 to 40, which provide international and domestic mechanisms for the implementation and monitoring of the *Convention*, offer important additions to existing international human rights law. Article 31 requires the collection of specified statistical data concerning people with disabilities, which must also cover social barriers.⁵³ Article 32 addresses international cooperation requiring states parties to cooperate in capacity building, sharing of scientific and technical knowledge and accessible and assistive technologies, and providing appropriate technical and economic

³⁴ Ibid art 10.

³⁵ Ibid art 14.

³⁶ Ibid art 15.

³⁷ Ibid art 16.

³⁸ Ibid art 18.

³⁹ Ibid art 21.

⁴⁰ Ibid art 22.

⁴¹ Ibid art 23.

⁴² Ibid art 13.

⁴³ Ibid art 12.

⁴⁴ Ibid art 24.

⁴⁵ Ibid art 27.

⁴⁶ Ibid art 28.

⁴⁷ Ibid art 29.

⁴⁸ Ibid art 30.

⁴⁹ Ibid art 17.

⁵⁰ Ibid art 19.

⁵¹ Ibid art 20.

⁵² Ibid art 26.

⁵³ Ibid art 31.

assistance.⁵⁴ Article 33 draws up an innovative system of domestic institutions for the *Convention*'s implementation and monitoring, which the next section discusses in more detail.

The form of international monitoring of the *Convention* resembles those of other human rights treaties, but it provides more specific guidelines for the mechanism's conduct. It encompasses periodic reporting,⁵⁵ and, through the *Optional Protocol*, individual communication⁵⁶ and inquiry procedures.⁵⁷ For these purposes, article 34 establishes the CRPD Committee (or the Committee).⁵⁸ The *Disabilities Convention* builds on the experiences of previous treaty bodies and attempts to respond to some major criticisms of these bodies. For example, to ensure consistency of reporting guidelines, suggestions and general recommendations, and to avoid duplications and unnecessary overlaps in the performance of the UN treaty bodies,⁵⁹ the CRPD Committee is encouraged to cooperate with the UN special agencies as well as 'other relevant bodies instituted by international human rights treaties.'⁶⁰ Article 37 requires the Committee 'to give due consideration to the ways and means of enhancing national capacities for the implementation of the *Convention*.'⁶¹ In such a way, the CRPD Committee is expected not only to be a normative body that considers periodic reports and produces jurisprudence, but also to be a facilitative or an advisory body.

⁵⁴ According to Kayess and French, international cooperation was one of the contested issue during the negotiation. The debate was mostly related to a contemplation that it would give an expectation or excuse to developing states that the *Convention* norms may not be able to be implemented without international assistance. This article, write Kayess and French 'reflects concerns of 'north — south' wealth transfers as well as highly integrated economic structure of today's world.' See Kayess and French, above n 8, 32.

⁵⁵ *Disabilities Convention* arts 34-8. Within two years of the Convention entering into force, each state party must submit to the Committee via the Secretary General a comprehensive report on measures taken to give effect to its obligation' and may also identify impediments to fulfilling those obligations. Subsequently the state parties must submit reports on at least once a four-year. The Committee is given flexibility to request more frequent reports, which is distinct among human rights conventions adopted before the CRPD.

⁵⁶ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008) art 1 (*Optional Protocol*).

⁵⁷ Ibid art 6.

⁵⁸ The Committee was established on 3 November 2008.

⁵⁹ Michael Ashley Stein and Janet E. Lord, 'Monitoring the Convention on the Rights of People with Disabilities: Innovations, Lost Opportunities and Future Potential' (2010) 32 *Human Rights Quarterly* 689, 692.

⁶⁰ *Disabilities Convention* art 38(b).

⁶¹ Ibid art 37(2).

Article 40 establishes the conference of states parties that convenes periodically. While previous treaties utilise this mechanism for narrow purposes such as amending treaty norms or appointing the members of treaty bodies,⁶² the *Disabilities Convention* envisages a broad purpose for the conference of states parties: to ‘consider any matter with regard to the implementation of the *Convention*.’⁶³ Therefore, the conference is expected to facilitate treaty implementation by bringing together a range of actors including states parties, UN agencies and civil society organisations and enabling them to engage in dialogue, debate and sharing of best practices.⁶⁴ Articles 41 to 50 address technical matters of international treaty law such as the depository,⁶⁵ signature,⁶⁶ entry into force,⁶⁷ reservations,⁶⁸ amendments,⁶⁹ and denunciation.⁷⁰

The *Optional Protocol* consists of 18 provisions. It enables the CRPD Committee to receive complaints concerning rights violations from individuals and groups of individuals, where they have exhausted domestic remedies.⁷¹ The *Optional Protocol* also establishes an inquiry procedure in relation to gross violations of the rights protected by the *Convention*.⁷²

B *The innovations of the Disabilities Convention*

The *Disabilities Convention* has many innovative features that have arguably expanded the traditional dimensions of international human rights law. First, as Graeme Innes puts it, the *Convention* ‘added, modified and transformed traditional rights to give them a more specific focus on disability.’⁷³ The ‘added’ entitlements include respect for

⁶² Stein and Lord, above n 59, 699-700, 714-5.

⁶³ *Disabilities Convention* art 40(1).

⁶⁴ Stein and Lord, above n 59, 700. Recently in international law domains, especially in the environmental regime, treaties provide for periodic conference of state parties for the purpose of assessing strengths and weaknesses in implementation, sharing information and data and facilitating coordination and dialogue among stakeholders including NGOs.

⁶⁵ *Disabilities Convention* art 41.

⁶⁶ *Ibid* art 42.

⁶⁷ *Ibid* art 45.

⁶⁸ *Ibid* art 46.

⁶⁹ *Ibid* art 47.

⁷⁰ *Ibid* art 48.

⁷¹ *Optional Protocol* art 1.

⁷² *Ibid* art 6.

⁷³ Graeme Innes ‘Towards Ratification of the Convention on the Rights of Persons with Disabilities’ (Parliament House, Tasmania, 20 August 2007)

physical and mental integrity,⁷⁴ the right to live independently and to be included in the community,⁷⁵ personal mobility,⁷⁶ and rehabilitation.⁷⁷ These entitlements are notable in contrast to the position of the Convention drafters, which was repeated in the course of negotiation, that ‘the treaty is not intended to create a new human right; rather it sought to apply the existing rights in the context of disability and identify the areas where adaptations must be made for people with disabilities to effectively exercise their rights and freedoms.’⁷⁸ Moreover, the *Convention* made some implicit claims of international human rights law explicit. For example, according to Frédéric Mégret, freedom from exploitation, violence and abuse came ‘somewhere between a compendium of existing rights and an almost entirely new right.’⁷⁹ Mégret writes:

In a sense, freedom from such treatment is another way of describing the ‘right to life, liberty and security of person,’ and can probably be seen as including freedom from torture, cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude, etc. However, all these rights are also protected independently in the *Disabilities Convention*, so that clearly ‘freedom from exploitation, violence and abuse’ must have been seen as adding something to the existing register of rights.⁸⁰

Although this entitlement appears somewhat creative from the perspective of mainstream human rights law, it is a traditional right in disability rights instruments. The first disability rights instruments — both the *Declaration on the Rights of Mentally*

<<https://www.humanrights.gov.au/news/speeches/towards-ratification-convention-rights-persons-disabilities>>.

⁷⁴ *Disabilities Convention* art 17.

⁷⁵ *Ibid* art 19.

⁷⁶ *Ibid* art 20.

⁷⁷ *Ibid* art 26.

⁷⁸ See Kayess and French, above n 8, 20. They wrote that despite its logical incoherence, this proposition was made repeatedly in the course of negotiations, was a feature of the rhetoric associated with its adoption and opening for signature and now also permeate the formative implementation dialogue and planning.

⁷⁹ See Frédéric Mégret, ‘The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?’ (2008) 30(2) *Human Rights Quarterly* 494, 507-8. See also Frédéric Mégret, ‘The Disabilities Convention: Towards a Holistic Concept of Rights’ (2008) 12(2) *The International Journal of Human Rights* 261.

⁸⁰ Mégret, ‘Human Rights of Persons with Disabilities or Disability Rights?’, above n 79, 508 (footnote omitted).

Retarded Persons (1971)⁸¹ and the *Declaration on the Rights of Disabled Persons* (1975)⁸² — protected freedom from exploitation and abuse.⁸³

Second, the *Convention* contains innovative obligations. The *International Bill of Rights* is focused more on the proclamation of rights, but less concerned in the provision of means to implement the obligations of states parties.⁸⁴ In comparison, the treaties protecting the rights of certain groups are more focused on prescribing the means to implement the obligations. Still, due to concerns of state sovereignty, earlier treaties such as *CEDAW* and *CRC* shied away from detailed prescriptions. The *Disabilities Convention*, however, goes into much greater depth in prescribing the means of implementation.⁸⁵ Specific obligations woven into treaty norms include: to repeal or adopt laws,⁸⁶ to mainstream the issues of people with disabilities,⁸⁷ to launch public awareness campaigns,⁸⁸ to build or adapt infrastructures,⁸⁹ to train specialists,⁹⁰ to employ certain individuals,⁹¹ to provide certain forms of services or assistance,⁹² and to consult with organisations of people with disabilities.⁹³ Regarding their level of detail, Frédéric Mégret claims that these obligations ‘come close to creating some sort of *sui generis* entitlements.’⁹⁴

Third, not only their level of detail, but also the focus of these obligations is innovative. International human rights law is traditionally focused on the relationship between state

⁸¹ *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856 (XXVI), UN GAOR, 3rd Comm, 27th sess, 2027 plen mtg, Agenda Item 12, UN Doc A/RES/2856 (20 December 1971) (*Declaration on the Rights of Mentally Retarded Persons*).

⁸² *Declaration on the Rights of Disabled Persons*, GA Res 3447 (XXX), UN GAOR, Supp No 34, 3rd Comm, 30th sess, 2433 plen mtg, Agenda Item 12, UN Doc A/RES/3447 (9 December 1975) (*Declaration on the Rights of Disabled Persons*).

⁸³ *Declaration on the Rights of Mentally Retarded Persons* para 6; *Declaration on the Rights of Disabled Persons* para 10.

⁸⁴ The *International Bill of Rights* consists of the *UDHR*, *ICCPR* and *ICESCR*.

⁸⁵ See, eg, Mégret, 'Human Rights of Persons with Disabilities or Disability Rights?', above n 79, 506.

⁸⁶ *Disabilities Convention*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008) arts 4(1)(a), 4(1)(b), 4(3), 15(2), 16(1), 16(5), 27(1), 30(3).

⁸⁷ *Ibid* art 4(1)(c).

⁸⁸ *Ibid* arts 8(1)(a), 8(1)(c).

⁸⁹ *Ibid* arts 9(1)(a), 9(2)(d).

⁹⁰ *Ibid* arts 4(1)(h), 8(2)(d), 9(2), 13(2), 20(c), 24(4), 25(d), 26(2), 31(1)(b).

⁹¹ *Ibid* art 24(4).

⁹² *Ibid* preamble (x), arts 4(1)(f), 4(1)(h)-(i), 7(3), 9(1), 9(2)(e)-(f), 16(2), 16(4), 19(b), 20(b), 21(c), 23(2), 23(3), 25, 26, 27(1)(e), 28(2)(a), 28(2)(c), 29(a)(iii), 30(1)(c), 32(1)(d).

⁹³ *Ibid* art 4(3).

⁹⁴ Mégret, 'Human Rights of Persons with Disabilities or Disability Rights?', above n 79, 506-7.

and individual.⁹⁵ In contrast, the *Disabilities Convention*, like *ICERD* and *CEDAW*, is much more focused on the societal dimension of the rights experience. The *Convention* particularly aims to create an enabling social environment where people with disabilities may live as equals with other members of a society. Articles 8 and 9 are definitive examples of such approach, which require states parties to eliminate negative social attitudes towards people with disabilities and make the social environment accessible to people with disabilities. The *Disabilities Convention*, write Janet Lord and Michael Stein, ‘is perhaps the most far-reaching of human rights instruments insofar as it outlines a framework for its obligations to take root not only in law, but more broadly, in society.’⁹⁶

Fourth, as Phillip French puts it, the *Disabilities Convention* ‘blends civil and political rights with economic, social and cultural rights not only within its overall structure, but also within its individual articles.’⁹⁷ Due to the ideological battle between socialist and democratic countries during the Cold War, it has been mistakenly believed that the international human rights law was built with a conceptual dichotomy between negative and positive rights.⁹⁸ A common belief is that negative rights, which constrain state interference in the enjoyment of human rights, are codified in *ICCPR*, whereas the positive rights, which require positive actions of states parties in their realisation, are contained in *ICESCR*.⁹⁹ While *CEDAW* and *CRC* encompass both sets of rights, the *Disabilities Convention* establishes the interdependency of these two sets of human rights much more explicitly.¹⁰⁰

⁹⁵ Ibid 507.

⁹⁶ Janet E. Lord and Michael Ashley Stein, 'The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities' (2008) 83 *Washington Law Review* 449, 479.

⁹⁷ Phillip French, ‘Human Rights Indicators for People with Disability: A Resource for Disability Activists and Policy Makers (Queensland Advocacy Incorporated, 2007) 12.

⁹⁸ See, eg, Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) 562; Manfred Nowak, *Introduction to the International Human Rights Regime* (Martinus Nijhoff Publishers, 2003) 10-14.

⁹⁹ The scope of any human rights obligation is both negative and positive, imposing not only a state duty to refrain from interfering with the exercise of a human rights, but also to protect the rights from infringement of third parties. See especially Shelton above n 98, 564-63.

¹⁰⁰ See Arlene S. Kanter, *The Development of Disability Rights under International Law: From Charity to Human Rights* (Routledge, 2015) 3.

Fifth, the *Convention* provides an innovative domestic institutional architecture for implementation and monitoring.¹⁰¹ While the *OP-CAT* was the first human rights treaty to require a special arrangement of domestic institutions,¹⁰² the *Disabilities Convention* expanded this trend. Article 33 of the *Convention* requires states parties to organise three tiers of domestic institutions, which include an implementation and coordination mechanism within the executive government,¹⁰³ a monitoring mechanism consisting of one or more independent institutions,¹⁰⁴ and monitoring by civil society organisations.¹⁰⁵ The obligation concerning the coordination mechanism is an obligation to consider, not to actually establish, the mechanism.

In consideration of the diversities of domestic institutional arrangements, states parties are given relative flexibility regarding what type of a monitoring mechanism they will establish. Nonetheless, the concept of independence is critical to such a framework. Reflecting the increased involvement of NHRIs in UN processes,¹⁰⁶ the *Convention* directly references the *Paris Principles*.¹⁰⁷ In this regard, Gerard Quinn writes, ‘the *Convention* makes explicit what is already implicit in international law — namely that NHRIs should have a key role to play in holding governments accountable locally to their international legal obligations in the field of human rights.’¹⁰⁸ Furthermore, the *Convention* emphasises the involvement of civil society actors, especially people with disabilities and their organisations, in its implementation and monitoring. As such, the

¹⁰¹ For a detailed analysis of domestic monitoring mechanism of the *Disabilities Convention*, see Sarah McCosker, ‘Innovations in Institution Building and Fresh Challenges: The Optional Protocol to the Convention against Torture and the Convention on the Rights of Persons with Disabilities’ in Hitoshi Nasu and Ben Saul (eds), *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge, 2011) 64.

¹⁰² See *OP-CAT* art 2.

¹⁰³ *Disabilities Convention* art 33(1).

¹⁰⁴ *Ibid* art 33(2).

¹⁰⁵ *Ibid* art 33(3).

¹⁰⁶ See, eg, Andrew Byrnes, ‘The Role of National Human Rights Institutions’ in Maya Sabatello and Marianne Schulze (eds), *Human Rights and Disability Advocacy* (University of Pennsylvania, 2014) 222; Lord and Stein, above n 96, 463.

¹⁰⁷ *National Institutions for the Promotion and Protection of Human Rights*, GA Res 48/134, UN GAOR, 3rd Comm, 48th sess, 85th plen mtg, Agenda Item 114(b), UN Doc A/RES/48/134 (20 December 1993). The resolution endorsed the Principles Relating to the Status of National Institutions (the Paris Principles) providing guidance on mandate and functions of independent national institutions for the protection and promotion of human rights.

¹⁰⁸ Gerard Quinn, ‘NHRIs and Next Steps Under the UN Convention on the Human Rights of Persons with Disabilities’ (Paper presented at 19th session, Annual Meeting of International Coordinating Committee, Geneva, 23 March 2007) 4 quoted in Sarah McCosker, above n 101, 80.

Convention creates ‘a system of permanent, continuous domestic monitoring in contrast to more infrequent and reactive monitoring of periodic reporting and sporadic individual complaints of the previous treaties.’¹⁰⁹

The *Disabilities Convention* is, then, an innovative human rights treaty. This is, firstly, because of the mismatch between the foundational tenets of international human rights law and the reality of everyday lives of some people with disabilities. In the context of disability, rights implementation requires a more complex arrangement than the denial of arbitrary state intervention. For example, ensuring the right to equality and non-discrimination for some people with disabilities requires accommodation in workplaces, public places, transportation and communication.¹¹⁰ Likewise, the electoral rights of people with disabilities cannot be realised unless voting places are made accessible.¹¹¹ People with disabilities are often marginalised and discriminated against in their relationships with other people and therefore, the *Disabilities Convention* is focused more on the societal dimension of rights experiences than the traditional state-and-individual focus of human rights. Gerard Quinn and Anna Arstein-Kerslake nicely illuminate this dilemma as:

[H]uman rights seem to commit us to an exaggerated caricature (a myth system) of the human condition: the rational, self-directing, wholly autonomous individual possessing moral agency unto him/herself. The spatial image at play is that of the masterless man freely choosing his/her own conception of the good and wandering purposively in an anomic no-man’s land interacting (or not) freely with others and opting (occasionally) to engage with and influence public power. Rights are primarily concerned with the intersection between this masterless man and power — especially public power. ...Our own everyday experiences are strikingly at odds with the myth system... [The *Convention*] forces to the surface many of these suppressed suspicions about the disconnect between ‘rights’ and the human condition.¹¹²

As such, the *Convention* inevitably added, modified and transformed international human rights law.

¹⁰⁹ Sarah McCosker, above n 101, 77.

¹¹⁰ Kanter, above n 100, 9.

¹¹¹ Ibid.

¹¹² Gerard Quinn with Anna Arstein-Kerslake, 'Restoring the "Human" in "Human Rights": Personhood and Doctrinal Innovation in the UN Disability Convention' in Conor A. Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press, 2012) 36, 37-8.

Secondly, the *Disabilities Convention* was intended to be a practically focused treaty to provide ‘a detailed code of how individual rights should be put into practice.’¹¹³ The proposals for creating a human rights treaty concerning people with disabilities have been dismissed for nearly two decades on the ground that the generic *Covenants* cover all people, including people with disabilities. However, as the fact that the international human rights regime remained largely irrelevant to people with disabilities became evident, a consensus was reached over the need to translate existing human rights in the context of disability. On this purpose of the treaty, the chair of the Ad Hoc Committee, New Zealand diplomat Don MacKay, notes that:

Although persons with disabilities are covered by the existing human rights conventions, they have fallen short in their enjoyment of the human rights and fundamental freedoms guaranteed by them. ...Sometimes, the other Human Rights Conventions set out their obligations in a quite broad and generic way, which can leave grey areas in their practical implementation vis-a-vis particular groups, such as persons with disabilities.¹¹⁴

The unprecedented level of participation of people with disabilities and their organisations in the drafting process enabled the *Disabilities Convention* to reflect the lived experiences of people with disability more than the legal technicalities of human rights law. According to Ambassador MacKay, at least 80 per cent of the final text of the *Convention* comes from the International Disability Caucus (IDC), a unified coordinating platform of the NGOs who contributed to the treaty negotiation.¹¹⁵ The purpose of the *Convention* however goes beyond the codification of human rights of people with disabilities. I will return to this story in the next chapter.

III THE PHILOSOPHY OF THE CONVENTION

A society contains a myriad of views of disability. Although different perspectives co-exist in any society, dominant perspectives shift as societies evolve. Especially in ancient societies where religious beliefs were strong, disability was often seen as a sign

¹¹³ United Nations, ‘Chairman says Draft Convention Sets Out “Detailed Code of Implementation and Spells Out How Individual Rights Should Be Put into Practice”’ (Press Release, SOC/4680, 12 August 2005) <<http://www.un.org/press/en/2005/soc4680.doc.htm>>.

¹¹⁴ United Nations, ‘Message from the Chair of the Ad Hoc Committee: International Day of Disabled Persons’ (Message, 03 December 2005) <<http://www.un.org/esa/socdev/enable/iddp05chair.htm>>.

¹¹⁵ Gerison Lansdown, ‘See me, Hear Me: A Guide to Using the UN Convention on the Rights of Persons with Disabilities to Promote the Rights of Children’ (Save the Children, 2009) 20 <https://www.crin.org/en/docs/See_me_hear_final.pdf>.

of moral flaws or a sin that was visited on a person as retribution.¹¹⁶ In Western countries, the rise of industrialisation promoted a different perspective of disability. By the 18th century, people with disabilities were required to cope with the demands of machinery and the regimented discipline of factory work.¹¹⁷ Sick and infirm people, who were marginalised by the economic system, were seen as a social burden, and a variety of institutional solutions were proposed to keep them away from society.¹¹⁸

By the 19th century, the rise of scientific knowledge and the prominence of social Darwinism provided another justification for the abuse and neglect of people with disabilities.¹¹⁹ Later, the eugenic movement promoted a belief that people with disabilities should be segregated and sterilised for the betterment of society.¹²⁰ These perspectives led to many massive brutalities in human history, including Action T4 — Hitler's policy to eliminate people with disabilities. It is estimated that between 200 000 and 250 000 people with disabilities were systematically murdered under Action T4.¹²¹ All these perspectives rest on an assumption that disability is an individual wrong, originated in the abnormality or defectiveness of an impaired individual. By the 1960s radically different views of disability emerged, locating the social wrongs of disability. These views underpin the human rights approach, the philosophical foundation of the *Disabilities Convention*. This part explicates the human rights approach to disability. To distinguish this approach from other comparable approaches, it begins by introducing typologies of legal entitlements of people with disabilities proposed by Marcia Rioux.

A *Typologies of disability legal entitlements*

Marcia Rioux claims that modern disability laws and international standards are underpinned by three approaches to the legal entitlements of people with disabilities: a

¹¹⁶ See, eg, Irina Metzler, *Disability in Medieval Europe: Thinking about Physical Impairment During the High Middle Ages c.1100 - 1400*, Routledge Studies in Medieval Religion (Routledge, 2006) 34-64; M. Miles, 'Disability in an Eastern Religious Context: Historical Perspectives' (1995) 10(1) *Disability & Society* 49; Henri-Jacques Stiker, *A History of Disability* (University of Michigan Press, 1999).

¹¹⁷ Colin Barnes and Geof Mercer, *Exploring Disability: A Sociological Introduction* (Polity, 2nd ed, 2010) 9.

¹¹⁸ *Ibid* 10.

¹¹⁹ *Ibid*. Social Darwinism is a modern name given to various theories of society that emerged in the United Kingdom, North America, and Western Europe in the 1870s, and which are claimed to have applied biological concepts of natural selection and survival of the fittest to sociology and politics.

¹²⁰ David Pfeiffer, 'Eugenics and Disability Discrimination' (1994) 9(4) *Disability and Society* 481, 489.

¹²¹ David J. Connor and Beth A. Ferri, 'Historicizing Dis/Ability: Creating Normalcy, Containing Difference' in Matthew Wappett and Katrina Arndt (eds), *Foundations of disability studies* (Palgrave Macmillan, 2013) 29, 42.

civil disability model, a compensatory privilege model and a well-being model.¹²² These approaches are informed by differing understanding of the concepts of disability and equality.

1 *Approaches to disability*

Rioux identifies four distinct social and scientific formulations of disability reflected in modern disability laws and policies.¹²³ These include a biomedical approach, a functional approach, an environmental approach and a rights outcome approach. The biomedical and functional approaches emanate from individual pathology, whereas the environmental and rights outcome approaches come from social pathology. Approaches from individual pathology share an identification of disability as inherent to an individual. By this pathology, disability denotes impairment and incapacity and therefore it is the private responsibility of people with disabilities to get cured or fixed in order to fit into society. Relatedly, disability and the attached costs are an anomaly and a social burden.¹²⁴ By contrast, approaches based on social pathology claim that disability is not inherent to the individual, but dependent on the social structure and thus identify society as the primary point of intervention.¹²⁵ Disability is recognised as a form of human difference, not deviance. Therefore, the social inclusion of people with disabilities is a matter of public responsibility.

Regardless of these commonalities, each of the two approaches from the same pathology has distinct claims. According to the biomedical approach, 'disability is caused by a mental or physical condition that can be prevented or ameliorated through medical, biological and genetic interventions.'¹²⁶ Therefore, disability is seen as a field of professionals and medical experts, whose role is to reduce the prevalence of the condition in the general population. Treatment and prevention of disability occur through biological intervention including surgery, prenatal screening and genetic

¹²² Marcia H. Rioux, 'On Second Thought: Constructing Knowledge, Law, Disability and Inequality' in Stanley S. Herr, Harold H. Koh and Lawrence O. Gostin (eds), *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* (Oxford University Press, 2003) 287, 302-12.

¹²³ Ibid 290.

¹²⁴ Ibid 291.

¹²⁵ Ibid 294.

¹²⁶ Ibid 291.

intervention.¹²⁷ Medical professionals decide who is disabled and who can legitimately benefit from social welfare. Public responsibility towards disability is restricted to custodial and medical care.¹²⁸ Under this approach, institutions and segregated housing are the conventional model of care for those who cannot be cured or rehabilitated.¹²⁹ The alternative is to keep them at home, but the state has a limited responsibility to provide services and support. Rights entitlements are restricted to the feasibility of an individual's incapacity and to the extent of independence.¹³⁰ For example, a child is entitled to education in a community school if they can access the school and are able to learn in the classroom as it is structured. In other words, an individual bears the burden to fit into society and participation is a right only to a certain extent.¹³¹

The functional approach recognises the impact of an impairment on the functional capacity of an individual.¹³² Under this approach, treatment of functional incapacity is broader than medical intervention, and includes the ways to enable impaired individuals to develop their potential and to become as socially functional as possible.¹³³ For example, those services include training for independent living, vocational or on-the-job training, functional assessments and counselling. Although the functional approach recognises environmental and situational factors in diagnosing and prescribing the means to normalise people's life opportunities, its primary focus is to restore functional capacities of the impaired individuals.¹³⁴ Therefore, it promotes rehabilitation as a key treatment. Professionals determine the best interests of an individual, which may not always coincide with what a person may want for him/herself. Ameliorating the negative effects of impairment and providing comfort of some kind are recognised as a social responsibility, which derives principally from a sense of benevolence and charity.¹³⁵

In contrast, the two social approaches to disability share the same root, but are based on different claims. As its name suggests, the environmental approach focuses on the

¹²⁷ Ibid.

¹²⁸ Ibid 292.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid 293.

¹³⁵ Ibid.

arrangements of social settings.¹³⁶ It identifies the physical barriers in a society that restrict the participation of people with disabilities in economic and social life including criteria or parameters of educational and employment programs. Laws and policies constructed from this perspective of disability direct the elimination of environmental barriers by adopting programs like accessible building codes, barrier-free design, adapted curricula, targeted policy and funding commitments, employment equity and affirmative action policies. It recognises the responsibility of society to eliminate systemic social barriers that hinder the social and economic participation of people with disabilities.¹³⁷

The rights outcome approach frames disability from a human rights perspective. It recognises the social causes of disability. However, it looks beyond barriers in the social environment, and focuses on broad factors that hinder people with disabilities from participating in society on an equal basis with others.¹³⁸ For example, the rights outcome approach seeks to understand questions like how society marginalises people with disabilities, and how society can be adjusted to accommodate more effectively the presence and needs of those who have been systematically marginalised. Under this approach, a wide variation in cognitive, sensory and motor abilities are recognised as inherent to the human condition or as normal states of human diversity. Since these variations should not limit people from contributing to society, the rights outcome approach recognises that some people will need support to participate in social and political life and therefore, providing such support is a matter of public responsibility.¹³⁹ Through this logic, the recognition of social and political entitlements is based on humanity rather than economic contribution or social usefulness, and thus, people with disabilities are recognised as having equal rights to those of all others in society.¹⁴⁰

¹³⁶ Ibid 294.

¹³⁷ Ibid 295.

¹³⁸ Ibid.

¹³⁹ Ibid 296.

¹⁴⁰ Ibid.

2 *Approaches to equality*

In addition to these disability approaches, adherence to a particular understanding of equality in laws and policies animate the treatment of people with disabilities.¹⁴¹ Rioux identifies three concepts of equality underpinning modern mechanisms for distributive justice applied to people with disabilities: the equal treatment approach, the equality of opportunity approach and the equality of wellbeing approach.¹⁴²

The equal treatment model — sometimes called the formal theory of equality or the Aristotelian notion of equality — assumes that equality depends on sameness and requires that likes be treated alike.¹⁴³ Because difference denotes unequal treatment, there is no need to clarify what makes people equal in particular circumstances or for particular purposes.¹⁴⁴ The equal treatment standard of equality assesses legitimacy of a law on its procedural fairness and therefore this model of equality can be relatively easily met even in the face of significantly different social and economic entitlements and outcomes among different groups of people.¹⁴⁵ Because people with disabilities are considered different from normal people, measures such as therapeutic interventions, vocational training and sheltered workshops can meet this standard of equality. Segregation of people with disabilities is considered legitimate because of their differing capacities.¹⁴⁶ The equal treatment approach fails to recognise the reality of human differences and systematic injustice, which are entrenched in the social structure and disadvantage some groups of people.¹⁴⁷

The equal opportunity approach recognises that everyone, regardless of their personal characteristics, should have equal opportunity to participate in social and political life, and to exercise their human rights.¹⁴⁸ Unlike the equal treatment approach, the equal

¹⁴¹ Ibid.

¹⁴² Ibid. See also, Marcia H. Rioux and Christopher A. Riddle, 'Values in Disability Policy and Law: Equality' in Marcia H. Rioux, Lee Ann Basser Marks and Melinda Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff Publishers, 2011) 37, 49-53. In the latter work, Rioux and Riddle expand the equality of wellbeing approach and, drawing on works of Ronald Dworkin, call a similar concept of equality 'equality of outcome' model, 'equality of resource' model and 'equality of respect' model.

¹⁴³ Rioux, above n 122, 297.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid 298.

¹⁴⁷ Ibid 299.

¹⁴⁸ Rioux and Riddle, above n 142, 44.

opportunity approach recognises the factual inequality between differently situated groups in a society, and seeks to remove the legal and institutional barriers standing in the way of people.¹⁴⁹ It assumes that, as long as these barriers are removed, people who have historically been faced with discrimination will be able to achieve substantive equality. The laws and policies informed by an equal opportunity approach attempt to rectify the historical disadvantages that people with disabilities experience, and recognise the claims for compensation such as affirmative action and employment equality that are designed to give them with a relatively similar starting position to others.¹⁵⁰ However, in reality, beginning the race from the same starting line is of a little additional benefit for some people with disabilities.¹⁵¹ Some disadvantages that people with disabilities experience are not solely the result of historic circumstances; they are also attributed to the current social structure.¹⁵² Rioux writes:

In most cases, people with disabilities cannot overcome natural characteristics and become like the 'norm', even if given equality of opportunity. This is because equality of opportunity is based on the assumption that the objective is to provide access to the competitive, individualistic market.¹⁵³

In many situations, the equal opportunity model fails to achieve substantive equality among people who are differently situated in the social hierarchy.¹⁵⁴

In contrast to the other two models, the equality of wellbeing model presumes equality as an end, not simply as means to meet other social goals. It claims that, without addressing associated disadvantages, removal of social barriers does not result in any substantive change. Therefore, a state is responsible not only for removing social barriers, but also for taking positive measures to enable a life of equal wellbeing for all people. The equality of wellbeing model shifts the focus of equality from the negative connotations of discrimination to the positive meanings of integration.¹⁵⁵

¹⁴⁹ Rioux, above n 122, 299.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Rioux and Riddle, above n 142, 48-9.

¹⁵⁵ Ibid 52.

Moreover, this standard of equality approaches a society not from an assimilationist view, but from a pluralistic view, paying attention to the ways that people with differences and similarities ought to treat one another in a just society.¹⁵⁶ It recognises that all people, regardless of their differences, have the same dignity and worth, and are entitled to exercise equal rights and to participate in their societies.¹⁵⁷ Therefore, making choices about how to live and what constitutes a good life to them is a right of an individual, even though people are not equal in talent, social usefulness or willingness to serve the community.¹⁵⁸ The equality of wellbeing approach recognises that conditions and means of social participation may vary with every individual, and supports the efforts to accommodate those differences. It, thus, requires respect for individual choices, and avoids prescribing results that are seen to be in an individual's best interests.¹⁵⁹

3 *Legal entitlements of people with disabilities*

Rioux argues that these varying approaches to disability and equality inform three models of the legal entitlements of people with disabilities — namely, a civil disability model, a compensatory privilege model and a well-being model — that inform modern laws and policies.¹⁶⁰

Figure 1¹⁶¹

The civil disability model presumes disability is ‘the consequence of an unchanging medical condition coupled with equality premised on equal treatment.’¹⁶² People with disabilities are given a distinct social status emphasising on employability and educability, which highlights their individual deficiencies or differences.¹⁶³ These

¹⁵⁶ Ibid 51.

¹⁵⁷ Rioux, above n 122, 300.

¹⁵⁸ Ibid.

¹⁵⁹ Rioux and Riddle, above n 142, 53.

¹⁶⁰ Rioux, above n 122, 301. However, in reality, there is no hard and fast line to distinguish as such. Often, these approaches coexist and overlap across many areas of law and policy.

¹⁶¹ A table showing the underlying concepts of disability and equality of three approaches of the legal entitlements of people with disabilities that was originally appeared in the referenced work by Rioux and used in the submitted version of this thesis has been removed from this open access version due to copyright restrictions. For the original figure, see Rioux, above n 122, 302.

¹⁶² Ibid.

¹⁶³ For example, if an individual is determined to be uneducable, there is no responsibility for state to ensure that public schools can accommodate such student or provide alternative learning models.

statuses justify the different treatment of people with disabilities and the imposition of cure, care and services on them. The civil disability model creates an authority to determine the capacity and competence of people with disabilities to medical professionals and experts.¹⁶⁴ Mostly in the charity sense, a state is expected to provide minimal social welfare assistance to people with disabilities. In return for concrete benefits such as medical care, housing, welfare and therapeutic service, however, people with disabilities are forced to surrender their private judgment.¹⁶⁵ Institutional living, segregated education, sheltered workshops and rehabilitation programs are promoted as standard policies directed to people with disabilities.

The civil disability model implies that there is something abnormal and negative about disability, which requires the protection of people with disabilities from a society, and protection of the society from those people.¹⁶⁶ Prevention from disability thus is promoted as a social good.¹⁶⁷ Relatedly also, significant scientific activities such as genetic research, genetic screening, facial surgery for people with Down's syndrome or involuntary sterilisation are taken to eliminate, cure or ameliorate the deficient characteristics.¹⁶⁸

The second, compensatory privilege model, recognises that, 'while there is a functional incapacity inherent to the individual, the physical and social environments may exacerbate it and therefore, equal opportunity should be provided to the extent that the disability is a consequence of external factors.'¹⁶⁹ The state does not have to provide opportunities to people with disabilities with the same outcome as able-bodied citizens as disability is still considered an individual difference.¹⁷⁰ Prevention and amelioration are directed to those who are seen to have the greatest potential for independent functioning, but those who are determined not to be able to achieve independent functioning are subject to permanent care, financial support and social benefits.¹⁷¹

¹⁶⁴ Ibid 304.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid 303.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid 302-3.

¹⁶⁹ Ibid 305.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

Under this model, medical professionals determine the extent of disability attributable to individual incapacity and environmental factors as well as what constitutes the best interest of people with disabilities.¹⁷² The moral basis for care and support is benevolence and compassion from the state, rather than entitlements based on full recognition of the humanity of people with disabilities.¹⁷³ Using this model, writes Rioux, ‘people with disabilities may trade rights for charity.’¹⁷⁴

In contrast to the two models discussed, the wellbeing model recognises that disability is a consequence of social, economic and political organisation, not an individual’s pathological condition.¹⁷⁵ Like the compensatory privilege model, the wellbeing model takes into account the historical disadvantages that people with disabilities experience. Furthermore, it acknowledges that everyone does not start the race in the same position and thus, the removal of formal barriers — both systematic and individual — will not leave everyone in the same position.¹⁷⁶ It therefore takes account of the current structure of society that maintains a systemic discrimination against people with disabilities.¹⁷⁷ The policies developed under the well-being model focus on the citizenship rights of people with disabilities, not on an individual’s status as a member of a class of deserving poor or social usefulness.¹⁷⁸ Consequently, social goods are allocated in ways to enable equal opportunity and accommodate inherent differences of individuals. The measures to enable substantive equality among all members of society are seen as the responsibility of a state, not an act of benevolence or compassion. Building on Rioux’s typologies, the following section explicates the claims of the human rights approach to disability—a distinct vision of the *Disabilities Convention* towards people with disabilities and their legitimate entitlements.

¹⁷² Ibid 306.

¹⁷³ Ibid.

¹⁷⁴ Ibid 305.

¹⁷⁵ Ibid 308.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

B Human rights approach to disability

Human rights approach to disability is the philosophical foundation of the *Disabilities Convention*.¹⁷⁹ An authoritative interpretation of the human rights approach to disability is yet to emerge from the practices of international and domestic courts and, most importantly, the CRPD Committee. However, for the purpose of this work, it is important to explicate the human rights approach to disability. It can be said that the *Convention*'s approach is founded on the wellbeing model of disability of Rioux, but it has extended the claims of the wellbeing model in the light of international human rights law.¹⁸⁰ Like the wellbeing model, the *Convention* perceives disability from the perspective of social pathology, providing that 'disability results from the interaction between persons with impairments and attitudinal and environmental barriers'¹⁸¹ A difference however is that the *Convention*'s concept of equality is based on the

¹⁷⁹ See, eg, Theresia Degener, 'A Human Rights Model of Disability' in Peter Blanck and Eilionóir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge, 2016) 31; Theresia Degener, 'A New Human Rights Model of Disability' in Valentina Della Fina, Rachele Cera and Guiseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer International Publishing AG, 2017) 41.

¹⁸⁰ Scholars provide different interpretations of human rights approach to disability. Eilionóir Flynn deconstructs the concept into four key components including equality, autonomy, participation and solidarity. See Eilionóir Flynn, *From Rhetoric to Action: Implementing the UN Convention on the Rights of Persons with Disabilities* (Cambridge University Press, 2011) 12-7. See also Marcia H. Rioux, Lee Ann Bassar Marks and Melinda Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff Publishers, 2011).

¹⁸¹ *Disabilities Convention* Preamble para (e). There is a robust criticism about the *Convention*'s approach to disability and, especially, its silence on prevention and rehabilitation. See, eg, Beth Ribet, 'Emergent Disability and the Limits of Equality: A Critical Reading of the UN Convention on the Rights of Persons with Disabilities' (2011) 14(115) *Yale Human Rights and Development Law Journal* 155, 158-60. Ribet points out that the construction of disability as an identity and the related claim that there is nothing inherently negative about disability other than social and political barriers stands at odds with other types of laws such as those concerning workers' compensation, personal injury or medical malpractice, where causing disability is seen as the basis of liability. See also Kayess and French, above n 8, 21-2; Kayess and French also claim that the *Disabilities Convention* is most influenced by an uncritical and populist understanding of social model of disability, where an impairment has no underlying reality. In contrast, a practice to interpret the *Convention*'s understanding of disability seems to indicate the preference of a balanced approach. For example, the *World Report on Disability* — the first global report concerning the living conditions of people with disabilities produced to aid the implementation of the *Disabilities Convention* — indicates that:

The medical model and social model are often presented as dichotomous, but disability should be viewed neither as purely medical nor as purely social: persons with disabilities can often experience problems arising from their health condition. A balanced approach is needed, giving appropriate weight to the different aspects of disability.

Cf World Health Organisation and World Bank, 'World Report on Disability' (2011) 4.

recognition of dignity of all human beings, whereas that of the wellbeing model is centred on citizenship rights.

The concepts of dignity and equality, the fundamental concepts of human rights law which are sometimes recognised as rights, lie at the heart of the *Convention's* approach.¹⁸² In human rights law, dignity is understood as an inherent and inviolable quality of each person that is possessed by virtue of his or her humanity.¹⁸³ Dignity does not depend on someone's social status, political affiliation, economic value, religion, ethnicity, race, gender or the ability to reason or merit.¹⁸⁴ Every person thus has the right to be treated as an individual with a personality, must be given voice about any issues affecting their lives and must have an ability to exercise choice, whenever possible.¹⁸⁵ Dignity requires respect for the physical integrity or autonomy of an individual.¹⁸⁶ Accordingly, the *Convention* claims that variations in physical, mental, intellectual or sensory ability are an inherent condition of the human family and such variations should not cause some people to be considered as second-class citizens.¹⁸⁷

Dignity also reiterates the idea that all people are rights-bearers, giving legitimacy for people with disabilities to construct themselves as ordinary people.¹⁸⁸ As rights-bearers, people with disabilities are entitled to benefits flowing from their membership in the human family. Meeting the basic needs of life is the first step in securing human dignity.¹⁸⁹ However, it is not only a matter of basic needs; everyone has to have a fair

¹⁸² It should be noted that the meaning of these concepts is not usually defined, and, depending on a context, they are interpreted differently. They are not completely separate, but are built on one another.

¹⁸³ Lee Ann Bassier, 'Human Dignity' in Marcia H. Rioux, Lee Ann Bassier Marks and Melinda Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff Publishers, 2011) 17, 19.

¹⁸⁴ *Ibid* 20.

¹⁸⁵ See *Disabilities Convention* Preamble para (n), arts 3(a), 3(d).

¹⁸⁶ Bassier, above n 183, 19. See also *Disabilities Convention* art 17.

¹⁸⁷ *Disabilities Convention* Preamble para (i), art 3(d).

¹⁸⁸ Bassier, above n 183, 21. Lee Ann Bassier writes:

The idea of dignity is important for an individual in the development of a sense of self and of self-esteem, providing a foundation for self-determination. An integrated sense of self and of self-esteem, coupled with an appreciation of one's worth, allows an individual to see him or herself as more than simply the sum of his or her limitations. Too often people with disabilities have seen themselves as others see and describe them, focusing on their 'deficit' or 'label.'

See also, *Disabilities Convention* Preamble para (m).

¹⁸⁹ Bassier, above n 183, 28.

share of social goods.¹⁹⁰ At this juncture, the concepts of dignity and equality meet. As such, the *Convention* recognises that all people, regardless of their differences, are entitled to consideration and respect as equals, and have equal right to participate in their society.¹⁹¹ It promises equality of opportunity and non-discrimination, and obliges the states parties not only to remove barriers, but also to take positive measures to enable a life of equal wellbeing for all.¹⁹² In such a way, the *Convention* recognises the historic and structural barriers disadvantaging people with disabilities.

Beyond the concept of human dignity, the *Disabilities Convention* emphasises strongly social inclusion and participation, perceiving these concepts both as a right of an individual and a public responsibility.¹⁹³ The *Convention* in fact defines disability from the point of social participation.¹⁹⁴ Such recognition reflects the historical legacy of segregation and incarceration, which fosters the othering culture and imparts a view of people with disabilities as less human.¹⁹⁵ Inclusion requires removal of environmental barriers and structures impeding social participation of people with disabilities.¹⁹⁶ It also requires promoting a non-discriminatory attitude towards people with disabilities.¹⁹⁷ Some scholars claim that an emphasis on social inclusion is the *Convention*'s creative addition to the international human rights law. For example, Gerard Quinn and Oddný Mjöll Arnardóttir write, '[the *Convention*] acknowledges that human rights ultimately serve a higher purpose, which is not merely to maintain people in dignity, but also to prime them for a life of choice, participation and active citizenship in the community.'¹⁹⁸

¹⁹⁰ Ibid.

¹⁹¹ *Disabilities Convention* Preamble para (b), (i), (k), arts 3(e), 3(g), 5.

¹⁹² See discussion in section II(B) of this Chapter.

¹⁹³ *Disabilities Convention* Preamble para (o), (v), arts 3(c), 3(f), 8, 9, 19, 29, 30.

¹⁹⁴ Ibid Preamble para (e). The Convention defines disability as resulting from 'the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.'

¹⁹⁵ Melinda Jones, 'Inclusion, Social Inclusion and Participation' in Marcia H. Rioux, Lee Ann Basser Marks and Melinda Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff Publishers, 2011) 56, 58.

¹⁹⁶ *Disabilities Convention* art 8.

¹⁹⁷ Ibid art 9.

¹⁹⁸ Oddný Mjöll Arnardóttir and Gerard Quinn, 'Introduction' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, 2009) xv xviii.

The human rights approach to disability claims that people with disabilities are valuable members of society who must be treated with dignity and respect, and are entitled to all human rights and freedoms on equal basis with others, and must be fully included in all areas of social life. In accordance with the *Convention*, taking steps to enable people with disabilities to live up to these claims and, for this purpose, implementing human rights and freedoms recognised by the *Convention*, are the matters of legal obligations of ratifying states.

IV CONCLUSION

Human rights treaties serve instrumental purposes. They codify the meaning of human rights, create the corresponding legal obligations for states parties and provide the means of implementing and enforcing such obligations. So does the *Disabilities Convention* seek to translate the existing norms of human rights law in the context of disability and clarify the means of implementing those norms. In doing so, the treaty has ‘added, modified and transformed traditional human rights.’¹⁹⁹ The drafting context of the treaty, where the participation of people with disabilities and their organisations were unprecedented, conditioned the treaty to reflect more lived experiences and voices of people with disabilities than the traditional dichotomies of human rights law. Reflecting the realities of disability, the *Convention* then became an innovative human rights instrument.

Human rights treaty norms are underpinned by explicit moral values or philosophical propositions, which make claims about a human’s position in society and guide the implementation of treaty norms. Despite being an inextricable element of the treaty texts, as I demonstrated in Chapter Two, the scholarship has paid little attention to the values of human rights treaties. Underpinning the norms of the *Disabilities Convention*, the human rights approach claims that people with disabilities are rights-bearers, who are entitled to the benefits flowing from their membership of the human family and to be able to participate in a society on an equal basis with others. Rioux identifies three models of legal entitlements — civil disability, compensatory privilege and wellbeing models — in modern disability laws and policies. The human rights approach to disability draws on the wellbeing model, but it extends its claims with a wider

¹⁹⁹ Innes, above n 73.

Chapter THREE

recognition of human dignity and social inclusion. The claims of the human rights treaty values are specific and cannot be confused with similar claims.

Intriguingly also, the values of human rights treaties tell something about us, legitimise a certain view about ourselves and declare an agreement of international community on legitimacy of such view. With these functions, human rights treaties serve political purposes and may become powerful political tools. The next Chapter explores the *Disabilities Convention* as a political product and a political tool.

CHAPTER FOUR A SYMBOLIC STRUGGLE: MAKING OF THE *DISABILITIES CONVENTION*

I INTRODUCTION

Chapter Three provided a textual reading of the *Disabilities Convention*, demonstrating that human rights treaties contain not only a legal obligation directed to states, but also moral values guiding the implementation of treaty norms. Building on that, this Chapter offers a historical reading of the *Convention*. It reflects on why and how the treaty came into existence and highlights the political missions of human rights treaties. In doing so, the Chapter looks beyond the formal processes of adopting a human rights treaty regarding the adoption a treaty, and traces the ideological process whereby the human rights approach to disability came into existence. This Chapter demonstrates that, apart from its instrumental purposes, the *Disabilities Convention* was created for broad political purposes.

The Chapter is divided into three parts. Making a journey to three local settings, including the UK, the USA and the Nordic countries, Part II discusses the emergence of what Rioux calls the social pathology approach to disability. Furthermore, Part II provides insights into the emergence of the disability movement in these countries. Part III explores the UN processes leading to the creation of the *Disabilities Convention*. This part highlights the attitudinal shifts on disability reflected in the UN instruments and major events that pushed the cultural changes forward. Part IV explores the necessity of a human rights treaty concerning disability from the perspective of its drafters. This part identifies three political purposes, which the *Disabilities Convention* was expected to achieve.

II DISABILITY MOVEMENTS AND SOCIAL APPROACHES TO DISABILITY

In the years following the Second World War, the influx of returning disabled veterans and economic prosperity resulted in the emergence of disability activism in some countries of Western Europe and North America.¹ By the 1960s, disability activists began identifying the social and cultural causes of disability and challenged the

¹ Dan Goodley, *Disability Studies: An Interdisciplinary Introduction* (Sage, 2011) 2-5.

centuries-old orthodoxy of disability as deviation, defectiveness and tragedy.² They began identifying the structural causes embedded in society and culture, which caused abuse, neglect and marginalisation of people with disabilities.³ By the 1980s, the idea that disability is rooted in social and cultural structures became widespread in North America and Europe.⁴ This part explores the emergence of the social pathology approach to disability in context.⁵

Without a doubt, like all ideologies, there has never been a coherent, uniform understanding of the social approach to disability. Rather, in reality, different versions of the idea highlighting the social causes of disability co-existed, constantly reframed and in competition with one another. David Pfeiffer, for example, identifies nine different versions of the social approach to disability, including the social model, oppressed minority model, social constructionist model, impairment version, independent living model, postmodern model, continuum model, human variation model and discrimination model.⁶ This part briefly discusses the emergence of social approaches to disability in the UK, USA and Nordic countries, highlighting the distinctive aspects of a dominant social approach in these countries.

A *The social model of disability*

The social model of disability is known as ‘the big idea’ of disability movements in the UK. The idea is associated with the Union of Physically Impaired Against Segregation (UPIAS), which emerged in the 1960s as one of many DPOs, promoting an alternative approach to social welfare measures in order to improve the living conditions of people with disabilities. Disability activists, who were frustrated with the silence of the Disablement Income Group — a leading DPO in the UK at the time — on the social

² Ibid 3.

³ Colin Barnes and Geof Mercer, *Exploring Disability: A Sociological Introduction* (Polity, 2nd ed, 2010) 1.

⁴ Ibid.

⁵ See Section III.A of Chapter Three. Rioux identified two types of social pathology approaches to disability, the environmental and rights outcome approaches. Varying understandings of disability and equality inform three models of legal entitlements of people with disabilities, which underpin the modern disability laws and policies. This Chapter focuses on approaches to disability.

⁶ David Pfeiffer, 'The Conceptualization of Disability' in Sharon N. Barnartt and Barbara M. Altman (eds), *Exploring Theories and Expanding Methodologies: Where We Are and Where We Need to Go* (JAI, 2001) 29, 31.

barriers marginalising people with disabilities, established two DPOs. These are the Disability Alliance and, as Tom Shakespeare describes, ‘the Marxist inspired’ UPIAS.⁷

The UPIAS aimed at replacing segregated institutions with opportunities for people with disabilities to participate fully in society, live independently, undertake productive work and control their own lives,⁸ whereas the Disability Alliance, a cross-disability group, sought to promote a comprehensive income scheme.⁹ In 1975, the UPIAS held a dialogue with the Disability Alliance and a summary of that dialogue was published as ‘Fundamental Principles of Disability.’ The document then became the first statement of what was to become the social model of disability.¹⁰ It states that:

Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in the society. Disabled people are therefore an oppressed group in society. To understand this, it is necessary to grasp the distinction between the physical impairment and the social situation, called ‘disability’, of people with such impairment. Thus we define impairment as lacking part of a limb, or having defective limb, organ and mechanism of body; and disability as the disadvantage and restriction of activity caused by a contemporary social organisation, which takes little or no account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities. Physical disability is therefore a particular form of social oppression.¹¹

The social model distinguishes between impairment and disability as corresponding biological and social concepts in a similar way that sex and gender operate in feminist studies. It claims that disability has nothing to do with impairment; rather, the barriers of social environment disable impaired people.¹² ‘Most illness are treatable and even curable; and all disability can be eradicated by changes to the way we organise society,’ claims Michael Oliver, who is one of the founding fathers of the idea.¹³ Moreover, the

⁷ Tom Shakespeare, *Disability Rights and Wrongs* (Routledge, 2006) 11.

⁸ According to Shakespeare, UPIAS pursued a radical activism because of views of its very active founders and members. The title ‘union’ reflects its intention to run political activism. Only people with physical impairments were eligible to become full member of the UPIAS, because of a fear of being taken over by non-disabled people.

⁹ Ibid 12.

¹⁰ Ibid.

¹¹ Mark Priestly in consultation with Vic Finkelstein and Ken Davis, ‘Fundamental Principles of Disability’ (A summary of discussion, Union of Physically Impaired Against Segregation and the Disability Alliance, 22 November 1975) 14.

¹² Michael Oliver, *The Politics of Disablement* (Springer, 1990) 45.

¹³ Michael Oliver, *Understanding Disability: From Theory to Practice* (Palgrave Macmillan, 2nd ed, 2009) 44.

social model strongly criticises the dominance of medical experts in determining disability and deciding the fate of people with disabilities.¹⁴

Over the years, the social model of disability became an important rallying point for DPOs in the UK and associated political actions. According to Oliver, the social model of disability caused a transformation of consciousness among medical professionals to reflect on their own practices and, most importantly, it also changed the perception of people with disabilities about themselves.¹⁵ In spite of the achievements, the social model has been widely criticised for its radical separation of disability from impairment.¹⁶ For example, Tom Shakespeare writes:

Over at least four decades, and in many different countries, social scientists and disability campaigners have regarded disability as bound up with social-context, and have drawn attention to the disadvantage, social exclusion and even oppression experienced by many disabled people. But only the British social model redefined disability as oppression.¹⁷

The social model of disability was not the only idea circulated and supported by disability activist groups in the UK.¹⁸ A DPO called the Liberation Network of People with Disabilities, while viewing that disability is a form of social oppression, also recognised the implications of impairments on people with disabilities.¹⁹ According to Shakespeare, the Liberation Network pursued softer strategies such as developing connection with other people with disabilities, creating an inclusive disability community for mutual support, promoting positive self-awareness, seeking control over media representation of people with disabilities and encouraging the formation of peer-support groups.²⁰

¹⁴ Michael Oliver, *Understanding Disability: From Theory to Practice* (St. Martin's Press, 1996) 35-7.

¹⁵ Oliver, above n 13, 42-8, 135-37.

¹⁶ See, eg, Tom Shakespeare and Nicholas Watson, 'Defending the Social Model' (1997) 12(2) *Disability & Society* 293; Shakespeare, above n 7, 11-14.

¹⁷ Shakespeare, above n 7, 11.

¹⁸ Ibid 13.

¹⁹ Ibid 14.

²⁰ Ibid. Shakespeare writes:

Significantly, the Liberation Network policy statement stresses that they welcomed the comments and contributions of others. It appears that theirs was a more fluid politics, which both involved women as leaders, and reflected a less workerist and more feminist style. There is a clear contrast between the Liberation Network's open style, stressing individual transformation and mutual support, modelled on

B *The minority rights approach*

In the USA, groups and individuals started mobilising to end the prejudice and oppression against people with disabilities as early as the 19th century, but it is only since the 1960s that disability activism emerged as a social movement.²¹ In the emergence of the US disability rights movement, influences from civil rights and feminist movements, queer politics and thousands of returning Vietnam War veterans were pivotal.²² Disability activists in the USA highlighted the common marginalised experiences of people with disabilities with African, Native and Hispanic American groups and draws on race and ethnicity concerns in North American politics.²³ In disability studies, a social approach dominating in the USA disability activism is called the minority rights approach. The minority rights approach emphasises disabling factors of social environment as the social model of disability. However, it does not draw a clear distinction between impairment and disability.²⁴

In line with the civil rights movement, US disability activists asserting a positive minority identity mobilised law for advancing their causes. Disability activists aimed for the adoption of comprehensive federal legislation that is modelled on the *Civil Rights Act* of 1964.²⁵ To this end, disability activists used collective political actions such as demonstrations, sit-ins and litigation.²⁶ By the 1970s, disability activists achieved a series of legal victories and landmark court decisions.²⁷ Ground-breaking

feminism and personal growth, and the more coherent and disciplined approach of UPIAS, modelled on labour movement politics.

²¹ See Doris Zames Fleischer and Frieda Zames, *The Disability Rights Movement: From Charity to Confrontation* (Temple University Press, 2011) 45-51.

²² Ibid 27.

²³ Goodley, above n 1, 13.

²⁴ Shakespeare, above n 8, 24. Regarding this distinction, Shakespeare writes:

While North American theorists and activists have developed a social approach to defining disability, these perspectives have not gone as far in defining ‘disability’ as social oppression as the British social model. Instead, the North American approach has mainly developed the notion of people with disabilities as minority group, within the tradition of US political thought. Minority group writers have argued that prejudice and discrimination against people with disabilities.

²⁵ Goodley, above n 1, 12.

²⁶ Ibid.

²⁷ See Connor and Ferri, above n 228, 46-8. The examples of such landmark cases include, *Wyatt v Stickney*, 325 F Supp 781 (MD Ala, 1971); *Pennsylvania Association for Retarded Citizens (PARC) v Commonwealth of Pennsylvania*, 334 F Supp 1257 (ED Pa, 1971); *Mills v Board of Education of the District of Columbia*, 348 F Supp 866 (DDC, 1972); *Halderman v Pennhurst State School and Hospital*,

statutes such as the *Rehabilitation Act* of 1973,²⁸ the *Individuals with Disabilities Education Act* of 1975²⁹ and the *Americans with Disabilities Act* of 1990 (*ADA*)³⁰ were adopted, enabling Americans with disabilities to gain access to civil rights claims to enforce their individual rights.³¹ The importance of these statutes was not restricted to the USA, but these laws, most notably the *ADA*, have inspired the disability discrimination laws of many other countries.³² Theresia Degener, for example, notes that, because of its claim based on the idea of civil rights, the US disability rights movement has been inspirational to the activism of people with disabilities across the world.³³

Alongside the dominant minority rights approach, many US writers and activists also identified social, cultural, political and psychological dimensions of disability.³⁴ They challenged the culture of 'able-ism,' the social biases against people whose bodies function differently from those considered to be 'normal' and the discriminatory beliefs and practices resulting from those biases.³⁵ Scrutinising the presentation of disability in novels, films, performance, art and drama, cultural analysis questions the common understanding of 'normal society' and considers 'how it promulgates its own precarious position through demonising dis/abled bodies.'³⁶

446 F Supp 1295 (ED Pa, 1977); *Disabled in Action of Pennsylvania v Coleman*, 448 F Supp 109 (ED Pa, 1978); *Rogers v Okin*, 478 F Supp 1342 (D Mass, 1979).

²⁸ *Individuals with Disabilities Education Act of 1975*, 20 USC §1400 (1975).

²⁹ *Rehabilitation Act of 1973*, 29 USC §701 (1973).

³⁰ *Americans with Disabilities Act of 1990*, 42 USC §12101 (1990).

³¹ Fleischer and Zames, above n 21, 47.

³² See, eg, Charles F. Szymanski, 'The Globalization of Disability Rights Law - From The Americans with Disabilities Act to the UN Convention on The Rights of Persons with Disabilities' (2009) 2(1) *Baltic Journal of Law & Politics* 18; Arlene S. Kanter, 'The Globalization of Disability Rights Law' (2003) 30(2) *Syracuse Journal of International Law and Commerce* 241, 242-53.

³³ Theresia Degener, 'Disabled Persons and Human Rights: The Legal Framework' in Theresia Degener and Yolán Koster-Dreese (eds), *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments* (Martinus Nijhoff Publishers, 1995) 9, 10.

³⁴ See, eg, Harlan Hahn, 'The Politics of Physical Differences: Disability and Discrimination' (1988) 44(1) *Journal of social issues* 39; Harlan Hahn, 'Can Disability Be Beautiful?' (1988) 18(3) *Social Policy* 26; Marcia H. Rioux and Michael Bach (eds), *Disability Is Not Measles: New Research Paradigms in Disability* (L'Institut Roehrer, 1994); Lennard J. Davis, *Enforcing Normalcy: Disability, Deafness and the Body* (Verso, 1995); Susan Wendell, *The Rejected body: Feminist Philosophical Reflections on Disability* (Psychology Press, 1996); Sharon L. Snyder and David T. Mitchell, *Cultural Locations of Disability* (University of Chicago Press, 2006).

³⁵ *Ibid.*

³⁶ Goodley, above n 1, 15.

Another distinctive feature of US disability activism is the independent living movement. Despite a flurry of definitions given to independent living, its philosophy is centred on four concepts: control, choice, freedom and equality.³⁷ The independent living movement claims that people with disabilities are experts on their own lives and, therefore, they should have the same life opportunities and the same life choices as their non-disabled peers. The philosophy encompasses all areas of economic and social life such as housing, education, work, politics, culture, worship and participation in the community.³⁸ Following the first centre established in Berkeley, California, in 1972, several hundred such centres were established, becoming hubs of disability activism. The concept of independent living has been adopted in the disability policies of many countries³⁹ and is reflected in international law, including the *Disabilities Convention*.⁴⁰

C *The relational approach to disability*

Since the 1950s, Denmark, Finland, Iceland, Norway and Sweden developed disability services in ways that have been celebrated as some of the world's best.⁴¹ In the course of such developments, a distinct social approach to disability rooted in the fundamental ideas of citizenship and equality, which are longstanding basic values of the Nordic welfare states, emerged.⁴² Norwegian socialist Jan Tøssebro calls this approach the relational approach to disability. He describes its fundamental claims relating to the nature of disability as:

In Norway, disability has been defined as 'a mismatch between the person's capabilities and the functional demands of the environment' or in terms of a gap between individual functioning and societal/environmental demands. Disability thus is a relationship, and it is relative to the environment. It is also situational rather than an always present essence of the person: A blind person is not disabled when speaking on the telephone, and exceptionally able when the lights have gone out. This relational/relative understanding of

³⁷ Frances Hasler 'Philosophy of Independent Living' (2003) <<https://www.independentliving.org/docs6/hasler2003.html#2>>.

³⁸ See Shakespeare, above n 7, 24.

³⁹ Following the first European conference on independent living, which was convened in Strasbourg, the European Network of Independent Living was founded in 1989. See Degener, above n 37, 14.

⁴⁰ *Disabilities Convention* art 19.

⁴¹ Goodley, above n 1, 16.

⁴² Rannveig Traustadóttir, 'Disability Studies, the Social Model and Legal Developments' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Martinus Nijhoff, 2009) 3, 12. But see, Bjørn Hvinden, 'Nordic Disability Policies in a Changing Europe: Is There Still a Distinct Nordic Model?' (2004) 38(2) *Social Policy & Administration* 170.

disability is fairly typical of the definitions in contemporary political documents in the Nordic countries.⁴³

The concept of normalisation, which seeks to extend welfare provisions and citizenship rights to the entire population, especially those who previously excluded, such as people with disabilities, is central to the relational approach to disability.⁴⁴ According to Lars Kebbon, the first documented reference to the concept of normalisation was found in the works of the Swedish State Committee for the 'partially able-bodied' in 1946.⁴⁵ The Committee proposed that people with partial sight and hearing loss, motor deficiencies and some chronic illnesses 'to as great an extent as possible be included in the ordinary system of social services which are being developed...'⁴⁶ In 1959, Denmark formulated the objectives of services for people with intellectual disability as 'to create a situation for the handicapped as near the normal possible, irrespective of whether it occurs entirely or partly within the institutions or out in the community.'⁴⁷ In 1967, the *Norwegian White Paper on Disability* claimed that 'rather than expecting that disabled people one-sidedly shall adapt to society, we also need to adapt the environment to them.'⁴⁸ This led to what scholars call 'an environmental turn in the Nordic disability law and policy.'

The relational approach does not separate the physical and social experiences of disability as the social model does and thus, it is seen as a milder version among social approaches to disability.⁴⁹ Regarding this aspect, Rannveig Traustadóttir notes that 'many have found it difficult to make this distinction in the Nordic languages and the Nordic concepts that are equivalent to the English term 'disability' are commonly used as umbrella terms to refer to groups of people with various impairments.'⁵⁰ While the social approaches prevailing in discourses in the UK and the USA culminated in the struggle of disability movements, the most influential proponents of the relational

⁴³ Jan Tøssebro, 'Introduction to the Special Issue: Understanding Disability' (2009) 6 *Scandinavian Journal of Disability Research* 3, 4.

⁴⁴ See Lars Kebbon, 'Nordic Contributions to Disability Policies' (1997) 41(2) *Journal of Intellectual Disability Research* 120. See also Shakespeare, above n 7, 22-3. Unacceptable living conditions and violations of human rights in long stay institutions triggered this new approach to disability.

⁴⁵ Ibid 120.

⁴⁶ Ibid.

⁴⁷ Ibid 123.

⁴⁸ Shakespeare, above n 7, 25.

⁴⁹ Tøssebro, above n 43, 4.

⁵⁰ Traustadóttir, above n 42, 13.

approach belong to government and academia.⁵¹ Partly because of that, the relational approach recognises positive influences of services and professionals in the lives of people with disabilities.⁵² For example, in the case of deinstitutionalisation of people with disabilities, Kebbon notes that:

So far, I have not mentioned the word deinstitutionalization. One reason is that this negative motive has never been a characteristic priority of Nordic policy. We have certainly been closing down proportionally more institutions than most other countries, but this has been motivated more by positive ambition to find alternatives and the quality of these alternatives. Not a single person has been moved out of an institution without a good alternative to go to.⁵³

In these ways, social approaches to disability developed in political struggles by people with disabilities and through development of government policies. These ideas travelled across borders, informed and enriched one another and influenced international law. The following part traces the influences of social approaches to disability policies in the UN and the international human rights law. In demarcating the conceptual shifts in the UN perspective of disability, I draw on the Rioux's typology, which I discussed in Chapter Three.

III DISABILITY AND THE UNITED NATIONS

A *Civil disability phase*

The earliest efforts of the UN towards people with disabilities focused on issues of prevention, rehabilitation and social welfare.⁵⁴ In the 1950s, the UN Secretariat and the Economic and Social Council (ECOSOC) — especially, the Social Commission, which was a subsidiary body to ECOSOC — were the focal points for disability issues.⁵⁵ In 1950, the Social Commission considered a report on social rehabilitation of the physically handicapped,⁵⁶ leading to the creation of programs focused on rehabilitation,

⁵¹ Goodley, above n 1, 16.

⁵² Shakespeare, above n 7, 25.

⁵³ Kebbon, above n 44, 123.

⁵⁴ Secretariat for the Convention on the Rights of Persons with Disabilities, Division for Social Policy and Development, Department of Economic and Social Affairs, United Nations, *History of Disability and the United Nations* (2003-4) (*Disability and the UN*) <<http://www.un.org/esa/socdev/enable/dis50y20.htm>>.

⁵⁵ Ibid.

⁵⁶ *Social Rehabilitation of the Physically Handicapped — Report of the Secretary General*, Economic, and Social Council, Social Commission, 6th sess, UN Doc E/CN.5/197 (22 March 1950).

prevention and treatment of physically and visually impaired people.⁵⁷ In that year also, the UN convened a conference to coordinate the efforts of its specialised agencies in the field of rehabilitation of people with disabilities. The conference resulted in agreement on the need to establish international standards for the education, treatment, training and placement of disabled persons, with a particular emphasis on the needs of the blind people in underdeveloped countries.⁵⁸

By the late 1950s, the UN expanded its work in the disability area, offering its member states technical advice, which encompassed advisory missions, personnel training programs, and the establishment of demonstration centres.⁵⁹ Study groups and teaching fellowships and scholarships were also offered for information sharing and exchange, and campaigns were organised. All these activities were focused on the prevention and rehabilitation of disability.⁶⁰

In the 1960s, the policy focus of the UN shifted to social integration of people with disabilities.⁶¹ The *Declaration on Social Progress and Development* (1969)⁶² affirmed the fundamental freedoms and principles set forth in the UN Charter,⁶³ and emphasised the need to protect the rights and welfare of physically and mentally disabled people.⁶⁴ On 20 December 1971, the *Declaration on the Rights of Mentally Retarded Persons* (1971) was adopted as the first human rights instrument in international law primarily concerning people with disabilities.⁶⁵ The *Declaration* stated that ‘a mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.’⁶⁶ It protected entitlements such as the right to proper medical care and physical therapy, rehabilitation, education, training and guidance,⁶⁷ to have economic security

⁵⁷ *Disability and the UN*, above n 54.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Declaration on Social Progress and Development*, GA Res 2542 (XXIV), UN GAOR, 3rd Comm, 24th sess, 1829th plen mtg, Agenda Item 48, UN Doc A/RES/2542 (11 December 1969) (*Declaration on Social Progress and Development*).

⁶³ *Charter of the United Nations* art 1(3).

⁶⁴ *Declaration on Social Progress and Development* art 11.

⁶⁵ *Declaration on the Rights of Mentally Retarded Persons*.

⁶⁶ *Ibid* art 1.

⁶⁷ *Ibid* art 2.

and a decent standard of living,⁶⁸ to have a qualified guardian,⁶⁹ and to be protected from exploitation, abuse and degrading treatment.⁷⁰ The *Declaration* also provided that, whenever possible, mentally retarded persons should live with their families or with foster parents, and should participate in different forms of community life, and if care in an institution becomes necessary, it should be provided in circumstances as close as possible to normal life.⁷¹

On 9 December 1975, the *Declaration on the Rights of Disabled Persons* (1975) was adopted.⁷² The *Declaration* provides that ‘disabled persons shall enjoy all the rights set forth in the *Declaration*’⁷³ and that they are entitled to the same civil and political rights as their fellow citizens of the same age.⁷⁴ It claims that the measures directed to disabled people should aim to enable them to ‘become as self-reliant as possible,’⁷⁵ and guarantees entitlements including the rights of disabled people to get access to medical treatment, rehabilitation, vocational training, and counselling,⁷⁶ to enjoy a decent life,⁷⁷ to live with their families⁷⁸ and to have qualified legal aid.⁷⁹ The *Declaration* prohibits all forms of exploitation, discriminatory, abusive or degrading treatment,⁸⁰ and differential treatment in residential institutions, and requires that, ‘if the stay in institutions is indispensable for disabled persons, the living conditions are required to be as close as possible to normal life.’⁸¹ Moreover, it declares that disabled people are entitled to have their special needs taken into consideration at all stages of economic and social planning,⁸² and that DPOs are to be consulted in all matters regarding their rights.⁸³

⁶⁸ Ibid art 3.

⁶⁹ Ibid art 5.

⁷⁰ Ibid art 6.

⁷¹ Ibid art 4.

⁷² *Declaration on the Rights of Disabled Persons*.

⁷³ Ibid art 2.

⁷⁴ Ibid arts 3, 4.

⁷⁵ Ibid art 5.

⁷⁶ Ibid art 6.

⁷⁷ Ibid art 7.

⁷⁸ Ibid art 9.

⁷⁹ Ibid art 11.

⁸⁰ Ibid art 10.

⁸¹ Ibid art 9.

⁸² Ibid art 8.

⁸³ Ibid art 12.

While these declarations were milestones in the UN recognition of the dignity and rights of people with disabilities, they are underpinned by the civil disability model of the legal entitlements of people with disabilities. Both instruments see disability as a medical condition, and therefore emphasise medical treatment, rehabilitation and vocational training as the main strategies to tackle disability.⁸⁴ By limiting state responsibilities towards people with disabilities through clauses such as ‘to the maximum degree of feasibility,’ ‘as far as possible,’ ‘as close as possible,’ or ‘as normal as possible,’ the declarations communicate an assumption that people with disabilities possess a different status, which justifies differential treatment. For a similar reason, the two declarations also begin with a statement that ‘[The General Assembly is] aware that certain countries, at their present stage of development, can devote only limited efforts to this [the fulfilment of the rights enumerated] end.’⁸⁵

B *Compensatory privilege phase*

On 16 December 1976, the UN General Assembly declared 1981 to be the International Year of Disabled Persons (IYDP).⁸⁶ The IYDP was observed under the slogan of ‘Full Participation and Equality’ and called for creation of national, regional and international disability action plans to promote social integration, rehabilitation and prevention.⁸⁷ The year stimulated numerous events, programmes, research projects, policy innovations and recommendations.⁸⁸ Numerous conferences and expert meetings were organised globally, including the Founding Congress of Disabled People’s International (DPI), which convened in Singapore in December 1981. Scholars see that the establishment of DPI internationalised disability movements⁸⁹ and cemented ‘the genesis of an ongoing relationship between the UN and civil society institutions in the field of disability.’⁹⁰

⁸⁴ Michael Ashley Stein, 'Disability Human Rights' (2007) 95 *California Law Review* 75, 88.

⁸⁵ *Declaration on the Rights of Mentally Retarded Persons* Preamble para 6, *Declaration on the Rights of Disabled Persons* Preamble para 7.

⁸⁶ *International Year of Disabled Persons*, GA Res 31/123, UN GAOR, 3rd Comm, 31st session, 102nd plen mtg, Agenda Item 12, UN Doc A/RES/21/123 (16 December 1976).

⁸⁷ *Ibid* para 3.

⁸⁸ *Disability and the UN*, above n 54 <<http://www.un.org/esa/socdev/enable/d3is50y50.htm>>.

⁸⁹ See, eg, Diane Driedger, *The Last Civil Rights Movement: Disabled Peoples' International* (Hurst & Co, 1989).

⁹⁰ Raymond Lang, 'The United Nations Convention on the Right and Dignities for Persons with Disability: A Panacea for Ending Disability Discrimination?' (2009) 3(3) *European Journal of Disability Research/Revue Européenne de Recherche sur le Handicap* 266, 268.

At the conclusion of the IYDP, the General Assembly adopted the *World Programme of Action concerning Disabled Persons* (1982) (*WPA*),⁹¹ and proclaimed the decade from 1983 to 1992 as the International Decade of Disabled Persons (the International Decade).⁹² In using Rioux's typologies, the *WPA* signals a turn to the compensatory privilege model of disability legal entitlements in UN disability policy.⁹³ The *WPA* introduces two new concepts — handicap and the equalisation of opportunity, which contain elements of social approach to disability in their definitions. While 'handicap' is defined as 'a loss or limitation of opportunities to take part in the life of community on an equal level with others',⁹⁴ the equalisation of opportunity is 'the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life including sports and recreational facilities, are made accessible to all.'⁹⁵ Moreover, the *WPA* contains many innovative provisions such as increased involvement of DPOs in decision-making, where some provisions of the *Disabilities Convention* find their roots.⁹⁶

Nonetheless, the *WPA* still adheres to the view of disability as a medical condition, prioritising prevention and rehabilitation over equalisation of opportunity. For instance, the purpose of the *WPA* is 'to promote effective measures for prevention of disability, rehabilitation and the realization of the goals of "full participation" of disabled persons in social life and development, and "of equality"'.⁹⁷ The secondary importance given to the equalisation of opportunity as a strategy to improve the lives of people with disabilities can also be seen from the way that the *WPA* introduces the concept. It states that:

⁹¹ *World Program of Action concerning Disabled Persons*, GA Res 37/52, UN GAOR, 3rd Comm, 37th sess, 90th plen mtg, Agenda Item 89, UN Doc A/RES/37/52 (03 December 1982) (*WPA*).

⁹² *Implementation of the World Programme of Action concerning Disabled Persons*, GA Res 37/53, UN GAOR, 3rd Comm, 37th sess, 90th plen mtg, Agenda Item 89, UN Doc A/Res/37/53 (03 December 1982); *United Nations Decade for Disabled Persons*, GA Res 39/26, UN GAOR, 3rd Comm, 39th session, 71st plen mtg, Agenda Item 91, A/RES/39/26 (23 November 1984).

⁹³ As discussed in Chapter Three, the model recognises the negative impacts of a society on disability, but it sees disability as a functional incapacity of an individual.

⁹⁴ *WPA* para 7.

⁹⁵ *Ibid* para 12.

⁹⁶ *Ibid* paras 28, 85, 89-91, 93, 140, 149, 157, 177, 178. See also Beth Ribet, 'Emergent Disability and the Limits of Equality: A Critical Reading of the UN Convention on the Rights of Persons with Disabilities' (2011) 14(115) *Yale Human Rights and Development Law Journal* 155, 155-59.

⁹⁷ *Ibid* pt 1 (objectives).

To achieve the goals of ‘full participation and equality’, rehabilitation measures aimed at the disabled individual are not sufficient. Experience shows that it is largely the environment, which determines the effect of impairment or a disability on a person's daily life.⁹⁸

Like the IYDP, the International Decade prompted a whirl of activities aimed at improving the situation and status of people with disabilities. Several declaratory instruments were adopted. The *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* (1991)⁹⁹ were adopted in relation to an influential report of a special rapporteur Erica-Irene Daes.¹⁰⁰ The *Principles*, which emphasise traditional liberties as much as positive treatment and quality of treatment,¹⁰¹ provide comprehensive guidelines on applying human rights principles in mental health facilities. The *Tallinn Guidelines for Action on Human Resources Development in the Field of Disability* (1989) is another important instrument, which encouraged the recognition of people with disabilities as agents of their own destiny.¹⁰² In 1984, Leandro Despouy was appointed as a Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to study the connection between human rights and disability. The proclamation of regional decades followed the International Decade. In 1992, the Economic and Social Commission for Asia and the Pacific (UNESCAP) declared the period from 1993 to

⁹⁸ Ibid para 21.

⁹⁹ *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, GA Res 46/119, UN GAOR, 46th sess, 3rd Comm, 75th plen mtg, Agenda Item 98, UN Doc A/46/721 (17 December 1991). The *Body Principles for the Protection of All Persons under Any Form of Detention and Imprisonment* concern in the context of compulsory incarceration of persons suffering from mental illness. *Body Principles for the Protection of All Persons under Any Form of Detention and Imprisonment*, GA Res 43/173, UN GAOR, 43rd sess, 6th Comm, 76th plen mtg, Agenda Item 138, UN Doc A/43/8A/43/89 (9 December 1988). The *Declaration of the Elimination of Violence against Women* specifically mentions women with disabilities as a group that is especially vulnerable to violence. *Declaration of the Elimination of Violence against Women*, GA Res 48/104, UN GAOR, 48th sess, 3rd Comm, 85th plen mtg, Agenda Item 111, UN Doc A/48/629 (20 December 1993).

¹⁰⁰ Erica-Irene A. Daes, *Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities: Principles, Guidelines and Guarantees for the Protection of Persons Detained on the Grounds of Mental Ill-Health or Suffering from Mental Disorder*, UN Doc E/CN.4/Sub.2/1983/17/Rev.1 (30 June 1983) (*Daes report*).

¹⁰¹ See Eric Rosenthal and Leonard S. Rubenstein, 'International Human Rights Advocacy under the "Principles for the Protection of Persons with Mental Illness"' (1993) 16(3) *International Journal of Law and Psychiatry* 257.

¹⁰² *Tallinn Guidelines for Action on Human Resources Development in the Field of Disability*, GA Res 44/70, UN GAOR, 44th sess, 3rd Comm, 78th plen mtg, Agenda Item 101, UN Doc A/RES/44/755 (8 December 1989).

2002 the Asian and Pacific Decade of Disabled Persons and adopted the *Agenda for Action for the Decade*.¹⁰³

The *WPA* was reviewed every five years and the first major review of the *WPA* took place in Stockholm in 1987. The global meeting of experts recommended that the equalisation of opportunities should be the continued focus of *WPA* implementation, which the General Assembly endorsed.¹⁰⁴ The Stockholm meeting also recommended the creation of a human rights treaty concerning people with disabilities. In 1987, Italy raised the issue at the 42nd session of the General Assembly and so did Sweden again at the 44th session of the General Assembly in 1989. However, a consensus was not reached as to the necessity of a human rights treaty concerning people with disabilities.

C *The culmination of the human rights approach to disability*

In 1993, the UN convened the World Conference on Human Rights in Vienna and the Conference adopted the *Vienna Declaration and Program of Action*.¹⁰⁵ The *Vienna Declaration* reiterated the UN commitment to apply international human rights law to people with disabilities and recommended the adoption of the draft standard rules on the equalisation of opportunities for persons with disabilities as a substitute for a treaty.¹⁰⁶ Adopted on 20 December 1993, the *Standard Rules on the Equalisation of Opportunities for Persons with Disabilities* (1993) (the *Standard Rules*)¹⁰⁷ became another milestone in the conceptual shift of the UN towards disability. The *Standard Rules* affirm that:

The Global Meeting of Experts to Review the Implementation of the World Programme of Action concerning Disabled Persons at the Mid-Point of the United Nations Decade of Disabled Persons was held at Stockholm in 1987. It was suggested at the Meeting that a guiding philosophy should be developed to indicate the priorities for action in the years ahead. The basis

¹⁰³ *Asian and Pacific Decade of Disabled Persons 1993-2002*, United Nations Economic and Social Council, Economic and Social Commission for Asia and the Pacific, UNESCAP Res 48/3 (23 April 1992).

¹⁰⁴ *Disability and the UN*, above n 54 <<http://www.un.org/esa/socdev/enable/dis50y60.htm>>.

¹⁰⁵ *Vienna Declaration and Programme of Action*, GA Res 48/121, UN GAOR, 48th sess, 3rd Comm, 85th plen mtg, Agenda Item 114(b), UN Doc A/Res/48/632/Add.2 (20 December 1993) paras 63-5.

¹⁰⁶ *Ibid* 65.

¹⁰⁷ *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GA Res 48/96, UN GAOR, 48th sess, 3rd Comm, 85th plen mtg, Agenda Item 109, UN Doc A/RES/48/627 (20 December 1993) (*Standard Rules*).

of that philosophy should be the recognition of the rights of persons with disabilities.¹⁰⁸

The purpose of the *Standard Rules* was stipulated in the rights language as ‘to ensure that girls, boys, women and men with disabilities, as members of their societies, may exercise the same rights and obligations as others.’¹⁰⁹ Like the *WPA*, the *Standard Rules* identify three strategies to improve the life situations of people with disabilities, namely prevention, rehabilitation and equalisation of opportunities. However, the wording of the *Standard Rules* demonstrate their withdrawal from the concept of prevention of disability. For example, the *Rules* define the concept without any further elaboration.¹¹⁰ The language of the *Standard Rules* is far more concise than the *WPA*. The *Rules* use the term ‘persons with disabilities’ instead of ‘disabled people.’ By putting humanity in front of disability, they seemingly imply the recognition that disability is a form of human diversity, not deviation.

The *Standard Rules* consist of an introduction, a preamble, 22 substantive rules, and the provision of a monitoring system. The substantive rules are structured into three parts including preconditions for participation, target areas for equal participation, and implementation measures. The four rules, involving preconditions for equal participation, include awareness raising, medical care, rehabilitation and support service.¹¹¹ Accessibility, education, employment, social security, family life and personal integrity, culture, recreation and sports and religion are identified as the areas where equal opportunity should be ensured.¹¹² Furthermore, the *Standard Rules* identify several implementation strategies such as information and research, policy-making and planning, legislation, economic policies, coordination of work, support and recognition of organisations of people with disabilities, personnel training, national monitoring and technical and international cooperation.¹¹³ In these ways, the language and structure of the *Standard Rules* became very close to the *Disabilities Convention*. Like the

¹⁰⁸ Ibid para 7.

¹⁰⁹ Ibid para 15.

¹¹⁰ Ibid para 22. The *Standard Rules* distinguish between primary and secondary prevention. The term "prevention" means action aimed at preventing the occurrence of physical, intellectual, psychiatric or sensory impairments (primary prevention) or at preventing impairments from causing a permanent functional limitation or disability (secondary prevention).

¹¹¹ Ibid rules 1-4.

¹¹² Ibid rules 5-12.

¹¹³ Ibid rules 13-22.

Convention as well as the *WPA*, inputs of people with disabilities and DPOs were significant in drafting of the *Rules*.¹¹⁴ Without a surprise, the *Standard Rules* then strongly emphasises on the involvement of DPOs in decision-making.¹¹⁵

Although the *Standard Rules* are a non-binding instrument, they are supplemented by a significant monitoring mechanism, which encompasses the Commission for Social Development, the Special Rapporteur and a panel of experts, where DPOs are expected to be a majority.¹¹⁶ As a programmatic instrument, the *Standard Rules* stress dialogical approaches for their implementation and monitoring. For instance, they require the Special Rapporteur to establish a dialogue with stakeholders and to provide advisory services to the UN member states.¹¹⁷ Moreover, the *Standard Rules* recommend the allocation of extra resources for advisory services such as organisation of training programs and seminars, development of guidelines, and dissemination of information about best practices.¹¹⁸

The UN specialised agencies were not left behind the waves of conceptual shift. In 1983, the International Labour Organisation (ILO) supplemented its early instrument on disability (*Recommendation No 99*)¹¹⁹ with two new standards, namely, *Vocational Rehabilitation and Employment Convention No 159*¹²⁰ and *Recommendation No 168*.¹²¹ These standards replaced the ILO's focus from segregated employment and special treatment of disability to the concept of equalisation of opportunities through vocational rehabilitation and social integration. In 2001, the World Health Organisation (WHO) conceded the social dimensions of disability, renewing the *International Classification of Impairments, Disabilities and Handicaps* (ICF),¹²² its core standard for defining and measuring health and disability. The updated ICF reflects social factors to allow

¹¹⁴ See Degener, above n 33, 12. Degener writes, 'the impacts of disability organisations in the drafting process can be detected in the wording as well as in the content and spirit of [the *Standard Rules*].'

¹¹⁵ *Standard Rules* paras 3, 4, 6, 9.

¹¹⁶ *Ibid* para 3.

¹¹⁷ *Ibid* para 6.

¹¹⁸ *Ibid* para 10.

¹¹⁹ *Vocational Rehabilitation (Disabled) Recommendation*, ILO Recommendation No 99 (1955).

¹²⁰ *Vocational Rehabilitation and Employment (Disabled Persons) Convention*, opened for signature 20 June 1983, ILO Convention No 159, (entered into force 20 June 1985) (*ILO Convention No 159*).

¹²¹ *Vocational Rehabilitation and Employment (Disabled Persons) Recommendation*, ILO Recommendation No 168 (1985).

¹²² *International Classification of Impairments, Disabilities and Handicaps* (ICF), World Health Assembly Dec 52/21, 52nd sess, 90th plen mtg, Agenda Item 13.9, WHO Doc A54/VR/9 (22 May 2001).

recording the impact of the environment on the person's functioning. Other agencies, including the Children's Emergency Fund (UNICEF), the Educational, Scientific and Cultural Organisation (UNESCO) and the High Commissioner for Refugees (UNHCR), have all absorbed the conceptual change.¹²³

While disability-specific instruments of the UN increasingly recognised the equality and social inclusion of people with disabilities, the general edifice of international human rights law started including the issues of people with disabilities. The *CRC* became the first human rights treaty containing direct references to disability. It prohibits the discrimination against children with disabilities,¹²⁴ and recognises their right to enjoy a full and decent life, which promotes self-reliance and facilitates their active participation in the community.¹²⁵ However, emphasising social assistance, medical care and rehabilitation, the *CRC* communicates a view of disability as a special status.

Human rights treaty bodies adopted general comments concerning people with disabilities. *General Recommendation No 18* of the CEDAW Committee called for states parties to include information about women with disabilities in their periodic reports.¹²⁶ In 1994, the ESCR Committee issued *General Comment No 5*.¹²⁷ For the first time in international human rights law, *General Comment No 5* recognised disability issues as a human rights issue and provided that people with disabilities are entitled to full range of rights protected by the *Covenant*.¹²⁸ Later, a number of important instruments, which had pivotal roles in the creation of the *Disabilities Convention*, drew on the *General Comment No 5* of the ESCR Committee.

Gradually, a link was established between international human rights law and disability instruments. The resolutions of the UN Commission on Human Rights (CHR) on

¹²³ See Degener, above n 33, 20-33.

¹²⁴ *CRC* art 2(1).

¹²⁵ *Ibid* art 23(1).

¹²⁶ Committee on the Elimination of Discrimination against Women, *General Recommendation No 18: Disabled Women*, 10th sess, UN Doc A/46/38 (30 January 1992).

¹²⁷ Committee on Economic, Social and Cultural Rights, *General Comment No 5: Persons with Disabilities*, 11th sess, UN Doc E/1995/22 (9 December 1994).

¹²⁸ *Ibid* [5].

disability, which are adopted every two years, were pivotal in the process.¹²⁹ In relation to the report of Special Rapporteur Leandro Despouy, *Resolution 1994/27* was adopted.¹³⁰ The *Resolution 1994/27* focused on the *ICESCR* and the need for states and civil society organisations to provide information to treaty monitoring bodies. *Resolution 1996/27* welcomed the *General Comment No 5* of the *ESCR Committee* and called all treaty monitoring bodies to scrutinise the living conditions of people with disabilities.¹³¹ *Resolution 1998/31* explicitly claims that disability issues are human rights issues.¹³² It states:

that any violation of the fundamental principle of equality or any discrimination or other negative differential treatment of persons with disabilities inconsistent with the United Nations Standard Rules ... is an infringement of the human rights of persons with disabilities.¹³³

Moreover, *Resolution 1998/31* urged governments to ‘to cover fully the question of the human rights of persons with disabilities in complying with reporting obligations under the relevant UN human rights instruments.’¹³⁴ According to Quinn and Degener, *Resolution 1998/31* initially contained a paragraph on the need for a treaty, but it was withdrawn when it appeared not to attract sufficient support.¹³⁵

Resolution 2000/51 celebrates the adoption of the *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999)* and reiterates the claim made in *Resolution 1998/31*, that is, ‘any breach of the *Standard Rules* is an infringement of human rights.’¹³⁶ It invites all special rapporteurs to take into account the rights situations of people with disabilities and requests the Office of

¹²⁹ Gerard Quinn and Theresia Degener, *Human Rights and Disability: The Current Use and Future Potentials of United Nations Human Rights Instruments in the Context of Disability*, UN Doc HR/PUB/02/1 (2002) (*Human Rights and Disability Report*) 1.

¹³⁰ *Human rights and disability*, CHR Res 1994/27, 50th sess, 55th mtg, UN Doc E/CN.4/RES/1994/27 (4 March 1994).

¹³¹ *Human rights of persons with disabilities*, CHR Res 1996/27, 52nd sess, 51st mtg, UN Doc E/CN.4/RES/1996/27 (19 April 1996).

¹³² *Human rights of persons with disabilities*, CHR Res 1998/31, 54th sess, 51st mtg, UN Doc E/CN.4/RES/1998/31 (17 April 1998).

¹³³ *Ibid* para 1.

¹³⁴ *Ibid* para 11.

¹³⁵ *Human Rights and Disability Report*, above n 130, 295.

¹³⁶ *Human rights of persons with disabilities*, CHR Res 2000/51, 56th sess, 62nd mtg, UN Doc E/CN.4/RES/2000/51 (25 April 2000).

the High Commissioner for Human Rights to take deeper steps into the field of human rights and disabilities.¹³⁷

Meanwhile, regional and local initiatives promoting the rights and social participation of people with disabilities continued. In 1999, the *Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities* was adopted as the first binding human rights treaty addressed to people with disabilities.¹³⁸ In 2003, the Parliamentary Assembly of the Council of Europe adopted the *Recommendation 1592* (2003) entitled ‘Towards Full Social Inclusion of Persons with Disabilities.’¹³⁹ UNESCAP declared the Second Asian and Pacific Decade of Disabled Persons (2003-2012)¹⁴⁰ and adopted its action plan, the *Biwako Millennium Framework for Action towards an Inclusive Barrier Free and Rights Based Society for Persons with Disabilities* (2002).¹⁴¹ The African Decade of Persons with Disabilities (1999-2009) and the Arab Decade for People with Disability (2004-2013) were also proclaimed. Many countries adopted domestic laws recognising the rights of people with disabilities. The USA, Canada and Spain were the first countries to enact such laws and the UK, Sweden, Israel and Australia followed their example.¹⁴²

Through these developments, claims for creating a human rights treaty on disability had grown stronger. Numerous events were pivotal in building momentum for the treaty.¹⁴³ The UN held several expert meetings on legal protection of the rights of people with disabilities — in Berkeley in 1991, in Hong Kong in 1999, in Stockholm in 2000 and in

¹³⁷ Ibid para 1.

¹³⁸ *Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities*, opened for signature 8 June 1999 (entered into force 14 September 2001).

¹³⁹ *Towards Full Social Inclusion of Persons with Disabilities*, Council of Europe, Parliamentary Assembly, Recommendation 1592 (29 January 2003).

¹⁴⁰ *Promoting an inclusive, barrier-free and rights-based society for people with disabilities in the Asia Pacific region in the twenty-first century*, United Nations Economic and Social Council, Economic and Social Commission for Asia and the Pacific, UNESCAP Res 58/4 (22 May 2002).

¹⁴¹ *Biwako Millennium Framework for Action towards an Inclusive Barrier Free and Rights Based Society for Persons with Disabilities in the Asia and the Pacific*, United Nations Economic and Social Council, Economic and Social Commission for Asia and the Pacific, UN Doc E/ESCAP/APDDP/4/Rev.1 (24 January 2003).

¹⁴² Kanter, above n 32, 249.

¹⁴³ See Secretariat for the Convention on the Rights of Persons with Disabilities, *Expert Meetings and Seminars* (2007) <<http://www.un.org/esa/socdev/enab/disglobe.htm>>.

New York in 2001.¹⁴⁴ In March 2000, the first world NGO Summit took place in the People's Republic of China and produced the *Beijing Declaration on Rights of People with Disabilities in the New Century*.¹⁴⁵ In October 2002, the DPI organised a conference in Singapore involving DPOs from 109 countries and the conference adopted the *Sapporo Declaration* (2002).¹⁴⁶ The two Declarations called for the adoption of an international treaty protecting the rights of people with disabilities.

Reports produced by special rapporteurs, experts and civil society organisations also made significant contributions. They exposed evidence of injustice, negligence and disadvantage that people with disabilities face in their everyday life and made it clear that international human rights law remained largely irrelevant to them. In 1983, Special Rapporteur Erica-Irene Daes reported the commonplace nature of institutional abuse against people with disabilities including the misuse of medication and forced sterilisation.¹⁴⁷ Daes claimed that patients in mental health facilities were often detained involuntarily and were abused 'as guinea pigs for new scientific experiments.'¹⁴⁸

A comprehensive report by Special Rapporteur Leandro Despouy demonstrated that, owing to the presence of physical and social barriers, millions of people with disabilities throughout the world are segregated and deprived of all of their rights.¹⁴⁹ The *Despouy report* urged the treaty bodies to ensure the application of their respective treaties to people with disabilities. Special Rapporteur Despouy specifically addressed the ESCR Committee, and called for the Committee's leading role in implementing the rights of persons with disabilities.¹⁵⁰

¹⁴⁴ Marcia Rioux and Anne Carbert, 'Human Rights and Disability: The International Context' (2003) 10(2) *Journal on Developmental Disabilities* 1, 8.

¹⁴⁵ *Beijing Declaration on Rights of People with Disabilities in the New Century*, World NGO Summit on Disability, convened in Beijing, PRC in 10-12 March 2000 (12 March 2000).

¹⁴⁶ *Sapporo Declaration*, the 6th World Assembly of Disabled People's International, convened in Sapporo, Singapore in 15-18 2002 (18 October 2002).

¹⁴⁷ *Daes Report*, above n 100.

¹⁴⁸ *Ibid* 28 [225].

¹⁴⁹ Leandro Despouy, *Human Rights and Disabled Persons*, UN Publication Sales No E.92.XIV.4 (1991) <<http://www.un.org/esa/socdev/enable/dispaperdes0.htm>>.

¹⁵⁰ *Ibid* para 284.

In 1994, 1997 and 2000, Special Rapporteur Bengt Lindqvist produced three reports concerning the implementation of the *Standard Rules*.¹⁵¹ These reports pointed out the shortcomings of the current legal protection of the rights of people with disabilities and identified ways to strengthen the effectiveness of the instrument's implementation. To that end, Special Rapporteur Lindqvist recommended a 'twin track' approach, which encompasses the continued development of a disability dimension in the existing UN human rights monitoring system, while proceeding with elaboration of a treaty protecting the rights of people with disabilities.¹⁵² *Resolution 2000/51* of the Commission on Human Rights resulted in the ground-breaking study on international legal protection of the rights of people with disabilities that was carried out by scholars Gerard Quinn and Theresia Degener.¹⁵³ The study demonstrates the overwhelming irrelevance of the international human rights regime in protecting the rights and dignity of people with disabilities and established the need to adopt a separate treaty.

As a result of all these and other events that took place at the global, regional and local levels over several decades, on 19 December 2001, the UN General Assembly made a decision to establish an Ad Hoc Committee mandated to consider a draft human rights treaty protecting the rights of people with disabilities.¹⁵⁴ Regarding the journey to the creation of the *Convention*, Arlene Kanter writes:

Thinking back to 1948, when the *Universal Declaration of Human Rights* was drafted, the concept of disability rights did not exist. People with disabilities were not even considered to have a right to claim human rights protection as a group. In the following decades, when disability was mentioned in international or regional human rights documents, it was generally in the context of promoting access to treatment and rehabilitation

¹⁵¹ Bengt Lindqvist, *Final report of the Special Rapporteur of the Commission for Social Development on monitoring of the implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, UN Doc A/52/56 (1994) <<http://www.un.org/esa/socdev/enable/disecon003e1.htm>>; Bengt Lindqvist, *Final report of the Special Rapporteur of the Commission for Social Development on monitoring of the implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities on his second mission 1997-2000*, UN Doc E/CN.5/2000/3/Corr.1 (1997) <<http://www.un.org/esa/socdev/enable/disecon003e1.htm>>; Bengt Lindqvist, *Report of the Special Rapporteur of the Commission for Social Development on monitoring of the implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities on his third mandate 2000-2002*, UN Doc E/CN.5/2002/4 (2002) <<http://www.un.org/esa/socdev/enable/disecon003e1.htm>>.

¹⁵² Bengt Lindqvist, *Report of the Special Rapporteur of the Commission for Social Development on monitoring of the implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities on his third mandate 2000-2002*, UN Doc E/CN.5/2002/4 (2002) para 56.

¹⁵³ *Human Rights and Disability Report*, above n 132.

¹⁵⁴ *GA Resolution 56/168*.

under social welfare or medical model of disability, rather than ensuring that people with disabilities are entitled to the same rights as all other human beings. However, as the Ad Hoc Committee on the *CRPD* began its work, this situation began to change.¹⁵⁵

As mentioned in Chapter Three, the participation of civil society actors in the *Convention's* drafting exceeded the established practice of human rights treaties, which were mostly negotiated by government delegations.¹⁵⁶ From the very beginning, the Ad Hoc Committee acknowledged the expected close involvement of NGOs in the *Convention's* drafting. At its 8th meeting, on 1 August 2002, the Committee made a decision on the modalities for NGO participation in the treaty negotiation.¹⁵⁷ In December 2002, the General Assembly adopted *Resolution 57/229*, urging efforts to ensure the active participation of NGOs, and encouraging member states to involve people with disabilities, representatives of disability organisations and experts in the preparatory processes contributing to the work of the Ad Hoc Committee.¹⁵⁸

At its 2nd session, the Committee made a decision to establish a Working Group to prepare a draft text that would provide the basis for negotiation by member states and observers and directed that the Working Group to be consisted of 27 government representatives, 12 representatives of NGOs, especially DPOs that are accredited to the Ad Hoc Committee, and a representative from national human rights institutions.¹⁵⁹ Consequently, the level of involvement of NGOs increased throughout the negotiation process with many DPO representatives included in the state delegations. While the modalities of participation foresaw the possibility of holding closed meetings without

¹⁵⁵ Arlene S. Kanter, *The Development of Disability Rights under International Law: From Charity to Human Rights* (Routledge, 2015) 45.

¹⁵⁶ See Maya Sabatello and Marianne Schulze, 'Introduction' in Maya Sabatello and Marianne Schulze (eds), *Human rights and disability advocacy* (University of Pennsylvania Press, 2014) 1, 5; Marcia Rioux, Lee Ann Basser and Melinda Jones, 'Working within a New Human Rights Paradigm — the Way Forward' in Marcia Rioux, Lee Ann Basser and Melinda Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff Publishers, 2011) 479, 484-5.

¹⁵⁷ Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, *Report of the First Session of the Ad Hoc Committee*, UN Doc A/57/357 (July 2002) paras 10, 11
<<http://www.un.org/esa/socdev/enable/rights/adhoca57357e.htm>>.

¹⁵⁸ *Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, GA Res 57/229, UN GOAR, 3rd Comm, 57th sess, 77th plen mtg, Agenda Item 109(b), UN Doc A/RES/57/229 (18 December 2002) (*GA Resolution 57/229*).

¹⁵⁹ Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, *Report of the Second Session of the Ad Hoc Committee*, UN Doc A/58/118 & Corr.1 (3 July 2003) paras 15[1], 15[2]
<http://www.un.org/esa/socdev/enable/rights/a_58_118_e.htm>.

the participation of NGOs, it happened only on a few occasions during the first and last Ad Hoc Committee meetings.¹⁶⁰

During the *Convention's* drafting, international, regional and national DPOs as well as allied NGOs established a unified coordinating platform, known as the IDC. The IDC ensured the maximum influence of NGOs in the treaty negotiation by enabling them to advocate in 'one voice.'¹⁶¹ The membership of the IDC consistently increased during the process, and, by the end of the drafting, it had about a hundred members.¹⁶² Stefan Trömel writes:

The very active participation in the working group, with the same rights as Government delegates, was instrumental in confirming the role the disability community, organized as the International Disability Caucus, would play throughout the process, both as the representatives of persons with disabilities as main stake-holders in the *Convention* as well as in the role of experts. 'Nothing about us without us' was soon to become the slogan of the IDC, signalling to the world that the times had definitely passed when legislation and policies affecting persons with disabilities were prepared without their active involvement.¹⁶³

Raymond Lang et al claim that this larger input from direct beneficiaries was needed, mainly because of the fact that the vast majority of government delegations lacked the relevant experience and expertise of disability.¹⁶⁴ Michael Stein also comments that:

There was also an educative function of people with disabilities speaking during the Ad Hoc Committee sessions about what their lives were like. These ranges from very poignant and very moving discussions about what it was like to have been in an institution or a psychiatric hospital, what it was like to have seen people, who never left those institutions..., to more light-hearted, but pointed discussions. ...Most of the states' representatives, although they were open to the idea of a disability treaty, came from elite and privileged backgrounds — often came from the countries, where people with disabilities are not visible and are not seen as a part of the society. An idea that on everyday basis during these negotiations, the states'

¹⁶⁰ Stefan Trömel, 'A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities' (2008) 1 *European Yearbook of Disability Law* 115, 117.

¹⁶¹ Maya Sabatello, 'The New Diplomacy' in Maya Sabatello and Marianne Schulze (eds), *Human Rights and Disability Advocacy* (University of Pennsylvania Press, 2014) 239, 246-8.

¹⁶² Trömel, above n 163, 117.

¹⁶³ Ibid 117-8.

¹⁶⁴ Raymond Lang et al, 'Implementing the United Nations Convention on the Rights of Persons with Disabilities: Principles, Implications, Practices and Limitations' (2011) 5 *European Journal of Disability Research* 206, 218.

representatives interacted with people with disabilities ... was enormously useful, and it is reflected in the ultimate text of the document.¹⁶⁵

The *Disabilities Convention* is a symbol of the recognition that people with disabilities are equals in dignity, worth and rights with other members of the human family. The demands and aspirations of concerned people including people with disabilities and their organisations are woven in the texture of the UN disability instruments preceding the *Disabilities Convention* and gradually cultivated the ideological impetus of the *Convention*. It is then the product of ideological and political processes, which took place at local, regional and global levels over several decades. But the question remains: ‘*what is the purpose of creating a treaty especially given that there were other instruments protecting the rights of people with disabilities?*’ The following part responds to this question.

IV WHY A HUMAN RIGHTS TREATY?

The question whether to create a human rights treaty concerning disability was long debated. *What would a thematic Convention add? Would it not perpetuate the difference of people with disabilities and the attached stigma? Would it undermine the efforts to mainstream the human rights of people with disabilities in the work of the existing treaty bodies?* These are the questions that were commonly raised by member states as well as NGOs during the drafting of the *Disabilities Convention*.¹⁶⁶ In fact, the first session of the Ad Hoc Committee was mainly devoted to reflecting on these questions.¹⁶⁷ Based on *travaux préparatoires*, reports, and writings of scholars who participated in the *Convention’s* drafting, four considerations were integral in reaching to the decision to create a human rights treaty on disability.

First, the *Convention* sought to establish disability rights as a human rights issue in international human rights law.¹⁶⁸ As discussed, international human rights law has developed with little relevance to people with disabilities. Until the adoption of *CRC*,

¹⁶⁵ Centre for Human Rights, University of Pretoria, ‘The making of the Convention on the Rights of Persons with Disabilities: Professor Michael Stein’, YouTube Channel of the Centre, 5 April 2013 <https://www.youtube.com/watch?v=GWIf_NzpvYo&t=632s>.

¹⁶⁶ Ibid 116.

¹⁶⁷ Kanter, above n 32, 265.

¹⁶⁸ Ibid.

core human rights treaties did not have explicit references to people with disabilities.¹⁶⁹ Yet, the two *Covenants* prohibit any type of discrimination on various grounds including ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’¹⁷⁰ It is therefore widely claimed that the ‘other status’ clause of these provisions covers anyone who might have left out from the scope of international human rights law, including people with disabilities. The claim may seem plausible at the normative level. However, as I argue in this Chapter, it is perplexing at the conceptual level.

The UN disability instruments preceding the *Disabilities Convention* communicate varying understanding of disability and the legal entitlements of people with disabilities. There is ample ground to argue that, at least until the adoption of the *Standard Rules*, international law had a set of disability rights, not human rights of people with disabilities. Those disability-specific instruments were built on the assumption of disability as a medical condition or special status. The *CRC* protected the rights of children with disabilities, yet it only prescribes social assistance and medical care. The philosophy of international human rights law — that ‘human rights are the rights that one possesses, because the one is simply a human’ — sat uncomfortably in the context of disability. The treaty was expected to resolve this ambiguity.

Second, as Gerard Quinn and Theresia Degener described in their seminal report, the *Convention* should be intended to be a ‘visibility project.’¹⁷¹ These scholars write:

Times are changing. The disability rights movement has sunk deep roots in many countries around the world, especially over the past decade. [The *Convention*] in many ways a ‘visibility project.’ Its prime message is to remind us of something that we should not need reminding about, namely that persons with disabilities are human beings and therefore share the same human rights as everybody else and the right to enjoy them to the same degree.¹⁷²

¹⁶⁹ See *CRC* arts 2(1), 23. Article 2(1) states that ‘States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.’

¹⁷⁰ See *ICESCR* art 2(2); *ICCPR* art 2(1).

¹⁷¹ *Human Rights and Disability Report*, above n 132, 26.

¹⁷² *Ibid.*

The report exposes the lack of efficacy of the international human rights regime in protecting the rights of people with disabilities and claims that ‘just as the adoption of *CEDAW* has led to heightened awareness among the treaty monitoring bodies of the gender dimension of all human rights issue,’ the expected treaty could ‘prove to be the best possible catalyst for the mainstreaming of disability in the existing treaty monitoring machinery.’¹⁷³ The visibility argument was not only restricted to the international human rights regime; it was envisioned for a broader purpose. Quinn and Degener write, ‘a specific convention would at least signal to the world that this section of the population exists and has equal rights, hopes, dreams and aspirations.’¹⁷⁴ Elsewhere, Quinn also argues that counter to the cultural discounting of persons with disabilities; the treaty can help ‘trigger a new form of disability politics of engagement as well as responsiveness to the voices of persons with disabilities.’¹⁷⁵ Quinn writes:

Persons with disabilities are largely ‘invisible citizens,’ especially in developing countries. They tend not to engage in the political process. That means that stereotypes often go unchallenged and the cycle of exclusion is simply reinforced. It is suggested that, to a large extent, the success of the *Convention* will depend on how it can help trigger a new form of disability politics of engagement as well as responsiveness to the voices of persons with disabilities. As will be seen, the *Convention* actually creates new political openings.¹⁷⁶

As such, the *Disabilities Convention* was intended to trigger a renewed politics of disability. Thirdly, the Convention drafters saw that such a treaty will increase the level of development aid and investment directed to improving the status and situation of people with disabilities. Arlene Kanter, who has participated to the *Convention*’s drafting, notes that:

[W]ithout a binding UN convention, international human rights organizations and development organizations will continue to devote little or no attention and resources to the unequal treatment and discrimination people with disabilities face.’¹⁷⁷

¹⁷³ Ibid 295.

¹⁷⁴ Ibid.

¹⁷⁵ Gerard Quinn, ‘The United Nations Convention on the Rights of Persons with Disabilities: Toward a New International Politics of Disability’ (2009) 15(1) *Texas Journal of Civil Liberties & Civil Rights* 33, 38.

¹⁷⁶ Ibid 37.

¹⁷⁷ Kanter, above n 32, 267.

Finally, the treaty is expected to improve the rights implementation of people with disabilities. Kanter writes, ‘the treaty process, as well as the language itself, will encourage more effective monitoring and reporting on the enforcement of the *Convention* by government and NGOs.’¹⁷⁸

As described in Chapter Three, the comprehensive norms and sophisticated monitoring mechanisms are certainly novel aspects of the *Disabilities Convention*. Nonetheless, when it comes to the reasons for creating this treaty, the drafting history suggests that the codification and enforcement may have been the issues of secondary importance. Janet Lord and Michael Stein, who have also contributed to the treaty’s drafting, remind us that the *Convention* was crafted in recognition of a ‘transformative vision’ that a human rights treaty possibly bears in fostering domestic legal and policy reform.¹⁷⁹

These scholars write:

It is axiomatic that international human rights standards are implemented domestically, and are intended to take root through processes of domestic incorporation. Human rights treaties reflect this most basic idea in provisions that create obligations at the international level to be given effect at the domestic level, thereby ensuring meaningful translation of international norms into national-level action. ...There is a pattern among human rights advocates and scholars to focus narrowly on law reform and to invoke human rights norms before judicial and quasi-judicial bodies. ...Although these perspectives on the role of human rights in domestic law and process reflect important dimensions of international law and practice, they are not the sum total of human rights work. Indeed, they overlook the potentially mutually constitutive nature of domestication process and the transformative role that human rights treaties play within societies. Human rights practice increasingly is understood to occupy a much larger realm; domestic internalization of human rights norms causes micro-processes of acculturation that form the backbone of lasting social change. These developments formed part of the basis of negotiating the *CRPD*... As a consequence, those involved in the drafting of the *CRPD* attempted to build a framework within which the *Convention*’s eventual domestic incorporation would evolve beyond current human rights practice toward a broader transformative vision.¹⁸⁰

The *Disabilities Convention* then cannot be understood adequately in merely legalistic terms. The instrumentalist vision of human rights treaties — seeing these treaties as a

¹⁷⁸ Ibid.

¹⁷⁹ Janet E. Lord and Michael Ashley Stein, 'The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities' (2008) 83 *Washington Law Review* 449.

¹⁸⁰ Ibid 552-55 (footnotes omitted).

set of legal norms, which regulates states' behaviours through norm prescription and enforcement — fails to capture the non-legal purposes and functions that the treaty envisioned.

Regarding the bewildering intentions of a law, especially one with moral focus, Wibren van der Burg writes:

In some cases, the feeling that there should be a law on a certain subject is very strong, while the ideas about the precise content of such a law are diverse and vague. This seems irrational: if one focuses on the protective and instrumental functions, the reasons for wanting a law usually largely involve the content of that law. However, the expressive function of law is central here. It is important for our identity as a civilised nation that we do not treat human life, even in its embryonic form, as mere tissue and that this is expressed in our legislation and respected by those doing research. How this basic value should be elaborated is, however, less central to our self-understanding. In other words: that there is a law may be much more important than what the law is.¹⁸¹

Likewise, the expressive function is central to the *Disabilities Convention*. By expressing moral propositions, the *Convention* resolves the philosophical ambiguity of international human rights law to people with disabilities, challenges the existing power relations of societies and individuals, and creates a vision for better societies. This is essentially a political function. Having argued that the *Disabilities Convention* has legal and political purposes, the remaining chapters of the thesis examine how these purposes play out in the context of Australia and Mongolia.

V CONCLUSION

In Chapter Two, I argued that the scholarship commonly approaches human rights treaties as legal norms created for commanding and controlling the conduct of states. In contrast, the present Chapter, along with Chapter Three, demonstrates that human rights treaties cannot easily fit into this legalistic mould of international treaties. Chapter Three discussed the human rights approach to disability and highlighted that human rights treaties have an inextricable moral element, which is often overlooked in the scholarship.

¹⁸¹ Wibren Van Der Burg, 'The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues' (2001) 20(1) *Law and Philosophy* 31, 53.

This Chapter extends this claim, demonstrating that the nature and purpose of human rights treaties cannot be fully understood on the basis of their texts. The development of the *Convention* cannot be restricted to eight sessions of the Ad Hoc Committee; rather, it is a product of disability politics, which had taken place at local, regional and international levels for several decades. Understanding disability politics, which created the *Convention*, illuminates its three political purposes. First, the *Convention* was intended to resolve the philosophical ambiguity of international law on the status of persons with disabilities and declare the full membership of people with disabilities in the community of rights-holders. Second, the *Convention* was expected to stimulate, to borrow from Quinn, a ‘new politics of disability’ to counter cultural ignorance and invisibility of people with disabilities in social and political life.¹⁸² Third, a disability rights treaty is also expected to bring the issues of disability to the attention of development and human rights organisations and increase investment and development aid in this sector.

The *Disabilities Convention* is a major achievement for disability movements. Yet, it is inaccurate to reduce disability politics into a human rights treaty. For disability activists, adoption of the *Convention* was winning only one battle — not the entire war. Just as the idea of creating a treaty protecting the rights of people with disabilities came on to the agenda of disability movements in the course of their mobilisation, the mission of disability politics cannot be confined to treaty implementation.

Ultimately, the shifting understandings of disability, people with disabilities and their legal entitlements, as reflected in international disability instruments, suggests that a human rights treaty can be viewed as the process of moral reflection by humanity. The *Disabilities Convention* is believed to have signified the most advanced vision of the social status of people with disabilities thus far. The reflection would nevertheless continue as societies evolve. It is important to note that the *Convention* is ambiguous about many issues such as prevention, rehabilitation, legal capacity and compulsory treatment. It also does not cover emerging areas such as bioethics, which could become profoundly impactful on people with disabilities in the future. From this perspective,

¹⁸² Quinn, above n 178, 39.

one role of the treaty is to articulate and declare a moral proposition that is agreed by the international community at a certain point of time, rather than to command and control a conduct of states parties.

CHAPTER FIVE GOVERNANCE, RIGHTS AND TREATIES IN AUSTRALIA AND MONGOLIA

I INTRODUCTION

This Chapter introduces the two country case studies, providing a background to the research presented in the following chapters of this thesis. In particular, the Chapter discusses the features of Australia and Mongolia that shape the impacts of the *Disabilities Convention*. These include the political regime, governance and legal system, some aspects of domestic politics, human rights protection and the rules determining the application of international treaty laws.

The Chapter is divided into two main parts. Part II discusses Australia. It begins with a discussion of the Australian government system, including the parliamentary system and the federal system, and its implications on domestic politics. Following that, Part II explains the human rights protection system of Australia, highlighting its gaps. Australian law requires an act of Parliament to give international treaties effect in the domestic legal order. Nonetheless, the Australian judiciary has developed a set of principles, recognising various influences of human rights treaties on domestic laws. Part II briefly introduces those principles and then explains the treaty-making process of Australia.

Part III introduces Mongolia, which probably is one of the least examined countries in the social sciences. It is an interesting case for a study of social change, because there, to borrow from Naran Bilik's formulation, the East meets the West, nomadism meets urbanism and socialist legacies meets liberal democratic values.¹ In the past century, Mongolia has evolved through three different political regimes and legacies of the abrupt regime changes to, a large extent, inform the ways that Mongolians see their present and navigate their future. As such, Part III begins with an overview of the social and political changes of the country in the 20th century. Part III then discusses the Mongolian system of government, highlighting the fluidity of its public and political

¹ Naran Bilik, 'Modern Mongolia: From Khans to Commissars to Capitalists (Review)' (2005) 12(2) *China Review International* 550, 550. Bilik describes Mongolia as a place 'where East meets West, Lamaism meets shamanism, and the communist memory meets the reality of privatization.'

institutions in transition. Further, Part III analyses legal protection of human rights of Mongolia and identifies several gaps, hindering the system's effectiveness. Finally, Part III explains the rules concerning the domestic application of international treaties and the process of treaty-making.

II AUSTRALIA

A Governance

Human habitation in the Australian continent dates back some 40 000 years. Until European settlement in the late 18th century, ethnically diverse groups of indigenous Australians speaking more than 250 languages inhabited the continent. After the European discovery of the continent by Dutch explorers in 1606, Australia's eastern half was claimed by Great Britain in 1770. British settlement of the continent began with the arrival of the First Fleet in Botany Bay of New South Wales on 26 January 1788. As the migrant population grew steadily in subsequent decades, five additional self-governing British colonies — Queensland, South Australia, Western Australia, Victoria and Tasmania — were established. In March 1891, the first Constitutional Convention was held to consider a draft *Constitution* of the proposed federation of the British colonies. Following a series of referendums, the *Constitution of the Commonwealth of Australia 1901* (the *Australian Constitution* or the *Constitution*)² was approved by the people of the Australian colonies and enacted by an Act of the Parliament of the UK in 1900. The *Constitution* entered into force on 1 January 1901 and modern Australia was officially formed, comprising six colonies.

Like any constitutional instrument, the *Australian Constitution* reflects the international and domestic circumstances of its time of adoption. It does not easily fit into a model of a classic social contract — an agreement between a governor and governed. Reflecting its colonial history, the *Australian Constitution* can be more accurately understood as ‘a compact first between a new country and its imperial parent and second between the former Australian colonies and a new federal government.’³ The *Constitution* predates the UN and the rise of human rights at the international level and reflects 19th century

² *Constitution of the Commonwealth of Australia Act 1900* (Imp) 63 & 64 Vict, c 12 s 9 (*Australian Constitution*).

³ Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights*, New College lectures (UNSW Press, 2002) 17.

conceptions of international law and governance.⁴ When the *Constitution* was adopted, the British government had control over Australian foreign relations, and therefore, the *Constitution*'s drafters were excluded from including any provision that might suggest that Australia was capable of entering into treaties on its own behalf.⁵ Consequently, the *Australian Constitution* provides no guidance on the issues that are important to this research, such as the method of Australia's entry into international treaties, the effects of international treaties in the Australian legal order, and human rights. Following sections will review these issues. I will now describe the two fundamental principles of the Australian government, the federal system and the parliamentary system of government, and their implications for domestic politics.

In Australian federal system, the governing power is divided between six Australian colonies that formed the federation and the Commonwealth government.⁶ The Australian Constitution establishes the Commonwealth government that consists of the Parliament, executive government and judiciary.⁷ At the same time, the six original States as well as two self-governing territories, Australian Capital Territory (ACT) and the Northern Territory (NT), have their own constitutions, laws and governing political institutions including legislature, executive government and judiciary.⁸ Section 51 of the *Australian Constitution* outlines the specific areas where the Commonwealth Parliament can legislate.⁹ By contrast, the legislative power of the States is expressed in their *Constitutions* in general terms, enabling them to legislate for almost all areas except those exclusively reserved for the Commonwealth Parliament. As stipulated in section 109 of the *Constitution*, the Commonwealth laws prevail over inconsistent State laws.¹⁰ Territory Parliaments, like State Parliaments, exercise a plenary legislative power.

⁴ Hilary Charlesworth et al, *No Country is an Island: Australia and International Law* (University of New South Wales Press, 2006) 149-50.

⁵ Ibid 150.

⁶ The Commonwealth government is also called national government, central government, the Australian government and federal government. In this thesis, I used the terms of the Commonwealth government, the Australian government and federal government alternatively.

⁷ *Australian Constitution* chs I, II, III.

⁸ Territories are areas within Australia's borders that are not claimed by one of the six states. Australia has a number of territories in addition to these two self-governing territories. Territories can be administered by the Australian government, or they can be granted a right of self-government. For these two cases, the Commonwealth Parliament passed a law allowing each territory to convene their own parliament and make their own laws in a similar manner to the states.

⁹ *Australian Constitution* s 51.

¹⁰ Ibid s 109.

However, the Commonwealth also has a plenary legislative power over the Territories and thus Commonwealth laws can override Territory laws on any topic.

Political decisions in Australia are made in three levels, the Commonwealth, the State and Territories, and local governments, which are also known as local councils.¹¹ While the *Constitution* demarcates the areas of responsibilities of the Commonwealth and States and Territories governments, but most nationally-significant decisions are made on the basis of a consensus between all of the two levels of governments. The Council of Australian Governments (COAG) is the peak intergovernmental forum that drives national consensus.¹²

The *Australian Constitution* inherited the Westminster model of government,¹³ but blended it with strong bicameralism from the *US Constitution*.¹⁴ The Commonwealth Parliament, which consists of the British Crown, who is represented by the Governor-General, the House of Representatives (the House) and the Senate, is the supreme authority in governance.¹⁵ The parliamentary system of government means that the executive government is formed from within the Parliament and is directly answerable to it.¹⁶ According to the *Constitution*, the executive power is vested in Governor-General,¹⁷ but it is practically exercised by Prime Minister and Cabinet.¹⁸ The political

¹¹ The six States and the Northern Territory have established one further level of government, the local councils. There are over 560 local councils in Australia. The local councils administer community issues like waste collection, public recreation facilities and town planning. The States and the Territory government define the powers of local governments and decides the geographical areas that those governments are responsible for. See Australian Government, *How Government Works* (2018) <<https://www.australia.gov.au/about-government/how-government-works>>.

¹² The Members of COAG include the Prime Minister, State and Territory Premiers and Chief Ministers and the President of the Australian Local Government Association. See Council of Australian Governments, *About COAG* <http://www.coag.gov.au/about_coag>.

¹³ See, eg, Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis*, Constitutional Systems of the World (Hart Publishing, 2011) 15-7. The reliance on rule of law, and the Diceyan doctrine of parliamentary sovereignty and responsible government are the foundational architecture of the Australian government. The principles of parliamentary sovereignty and responsible government are developed from the power struggle between the Parliament and the Monarchy in England in the 17th century.

¹⁴ *United States Constitution* (1787).

¹⁵ *Australian Constitution* s 1.

¹⁶ Parliament of Australia, *Info sheet 20: The Australian system of government* (February 2014) <http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government> (*Info sheet 20*).

¹⁷ *Australian Constitution* s 61.

¹⁸ *Info sheet 20*, above n 19. Ministers are appointed by the Prime Minister, who also allocates portfolios. There are currently 30 Ministers including the Prime Minister. About 19 of those Ministers are senior Ministers, who administer the major departments. Senior Ministers are usually the members of the Cabinet. The *Constitution* also does not have reference to Cabinet.

party with a majority of members in the House becomes the governing party and its leader becomes the Prime Minister.¹⁹ Generally, the *Australian Constitution* provides little about executive power and thus, the practices are mostly guided by unwritten constitutional conventions.²⁰ The *Constitution*, for example, does not mention the office of Prime Minister, but it is practically the most powerful political position in Australia. The Governor-General performs the ceremonial functions of head of state on behalf of the Crown and, in accordance with constitutional convention, acts on the advice of the Federal Executive Council for almost all occasions.²¹ While the *Constitution* grants the Governor-General power to act independently, such powers are reserved for exceptional circumstances.²²

Under the Australian system of parliamentary government, Parliament and government have overlapping memberships. In this context, two primary mechanisms of checks and balances exist at the Commonwealth level. First, the Ministers are subject to the scrutiny of other Members of the Parliament led by an officially recognised Opposition. The Opposition is formed by a political party which has the most non-governmental members in the House, and acts on the basis of constitutional conventions.²³ The Opposition is regarded as an ‘alternative government,’ which would form government if the existing government loses the confidence of the House, or of the people at an election.²⁴ The Leader of the Opposition, who is the elected leader of the main non-government party, is a major political figure, and is normally expected to become the Prime Minister if the existing government loses the office.²⁵ The Leader of the

¹⁹ *Australian Constitution* ss 24, 26. The House of Representatives represents the people from each State in proportion to their numbers. The *Constitution* says that each of the original States must have at least five Members, and the total number of Members must be, as nearly as practicable, twice the total number of Senators. Currently, the House has 150 members.

²⁰ *Info sheet 20*, above n 19.

²¹ *Ibid.* The Federal Executive Council is the constitutional mechanism for providing ministerial advice to the Governor-General. All Ministers and Parliamentary Secretaries become members of the Executive Council. Parliamentary Secretaries are appointed by the Prime Minister to assist or represent Ministers.

²² *Ibid.* The powers that the Governor-General exercises without the advice of the Federal Executive Council are called ‘prerogative’ or ‘reserve’ powers. Most notable of such powers is the power to dissolve the House of Representative and, in certain situations, both Houses. But these powers are not clearly defined in the *Constitution*. See also, Governor-General of the Commonwealth of Australia, *Governor-General’s Role* (6 April 2016) <<http://www.gg.gov.au/governor-generals-role>>.

²³ Parliament of Australia, *Info sheet 19: The House, Government and Opposition* (February 2014) <http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_19_-_The_House_-_Government_and_Opposition>.

²⁴ *Ibid.*

²⁵ *Ibid.*

Opposition is assisted by a number of shadow Ministers, who act as opposition spokespersons regarding the area of responsibilities of one or more Ministers. Parliamentary procedures are designed to enable the Opposition to scrutinise the conduct of government.²⁶

A second mechanism of check and balance lies with the Senate. Unlike the House of Lords of the UK Parliament, the Australian Senate has fully elected members.²⁷ While the government is supported by a majority of Members in the House, it often does not have majority support in the Senate. However, to govern, it must be supported by the Senate.²⁸

The federal system can also place an additional check and balance on executive government. Australian States and Territories run their own elections and therefore, different political parties may form the Commonwealth and State and Territory governments. Despite a number of registered political parties,²⁹ Australia has a de facto two-party political system.³⁰ Every elected Prime Minister since 1910 has been a member of either the Australian Labor Party (Labor or the ALP) or the National — Liberal Coalition (the Coalition).³¹ Both of these parties believe in social democracy, but they differ in philosophy. In its simplest sense, the centre-left ALP traditionally sought to strengthen the central governmental power to develop a collective social policy, whereas the Liberal Party supported individual autonomy and the federal system.³² The philosophical differences of the two parties become a factor to

²⁶ Ibid.

²⁷ *Australian Constitution* s 7. In the Senate, each State is represented equally and there must be at least six Senators from each State. Currently, the Senate consists of 76 senators, 12 from each of the six states and two from each of the mainland territories.

²⁸ Most importantly, the Senate approves the government budget. It is a reserve power of the Governor-General to dismiss a government that is unable to obtain budgetary supply from the Senate.

²⁹ See Australian Electoral Commission, *Current Register of Political Parties* (16 May 2016)

<http://www.aec.gov.au/parties_and_representatives/party_registration/Registered_parties/>.

³⁰ Parliament of Australia, *Info sheet 22: Political Parties* (January 2014)

<http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_22_-_Political_parties>.

³¹ Ibid.

³² Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 42. The ALP has historic ties with the trade union movement. The Coalition is an alliance between the urban-based Liberal Party and the rural-based National Party. These two parties have been traditionally seen as ‘conservative’ or ‘centre-right’ and have historic ties with the business and farming communities.

contentious domestic politics. Under these conditions, achieving a national consensus for a major policy reform can be a hard political battle in Australia.

The *Australian Constitution* establishes an independent judiciary consisting of the High Court, other federal courts and States courts.³³ The *Constitution* draws a strict separation of the judiciary from the Parliament and government. In fact, in Australia, the doctrine of separation of power can be understood primarily as separation of judicial power.³⁴ The judiciary, especially the High Court exercising the constitutional review power, can shape the conduct of political institutions significantly. However, compared to its counterparts elsewhere, the Australian judiciary plays a modest role in the country's governance.

B Human rights protection

1 Legal framework

Australia is the only Western liberal democracy that does not have comprehensive legal protection of human rights. The *Australian Constitution* does not contain a bill of rights, but it recognises several explicit and implicit entitlements of individuals. These include the right to be compensated on just terms for acquisition of property by the Commonwealth,³⁵ the right to trial by jury on indictment,³⁶ the right to free movement of people and free trade between states,³⁷ the freedom of religion,³⁸ the right not to be discriminated against on the basis of state residence,³⁹ and the right to vote in Commonwealth elections subject to restrictions imposed by law.⁴⁰ Moreover, some implicit rights are identified in the *Constitution* such as the right to free political communication,⁴¹ and potentially, the associated freedom of political movement,⁴² and

³³ *Australian Constitution* ch III. The *Constitution* provides that the judicial power of the Commonwealth to be vested in three levels of courts including the High Court, other federal courts and States courts. The High Court is the highest court in the Australian court hierarchy. According to the *Constitution*, the High Court must comprise of Chief Justice and at least two other Justices. Currently, the High Court has six Justices in addition to the Chief Justice.

See High Court of Australia, *About* (2010) <<http://www.hcourt.gov.au/about/role>>.

³⁴ See Saunders, above n 16, 185-90.

³⁵ *Australian Constitution* s 51(xxxi)).

³⁶ *Ibid* s 80.

³⁷ *Ibid* s 92.

³⁸ *Ibid* s 116.

³⁹ *Ibid* s 117.

⁴⁰ *Ibid* ss 24, 44.

⁴¹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

the right to legal equality.⁴³ Although these entitlements to some extent resemble internationally recognised human rights, they have specific meanings rooted in common law principles.⁴⁴ According to Julie Debeljak, only sections 80, 116 and 117 of the *Constitution* can be categorised as proper human rights provisions.⁴⁵ These entitlements are often interpreted narrowly by the courts, giving greater freedom to the political arms of the Commonwealth government in their creation and enforcement.⁴⁶ On this aspect, Melissa Castan writes '[w]here protections of rights is identified by the High Court, those protections tend to be expressed as constraints on the government power rather than individual guarantees of liberty.'⁴⁷

Australia adopted various statutes protecting the rights of individuals. The most prominent type of statutory rights protection is anti-discrimination laws.⁴⁸ The Commonwealth adopted four such pieces of legislation prohibiting discrimination on the grounds of race,⁴⁹ sex,⁵⁰ disability⁵¹ and age.⁵² States and Territories have also adopted similar laws.⁵³ These anti-discrimination legislations share many common features, but generally State and Territory laws provide a broader scope than Commonwealth legislation.⁵⁴ These laws are administered by designated commissions or boards and are enforced on the basis of individual complaint.⁵⁵ Australian scholars

⁴² *Kruger v Commonwealth* (1997) 190 CLR 1.

⁴³ *Leeth v Commonwealth* (1992) 174 CLR 455, See Charlesworth, above n 4, 31.

⁴⁴ See Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (Federation Press, 2nd ed, 2004).

⁴⁵ Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters (Professional) Australia, 2013) 37, 39.

⁴⁶ *Ibid.*

⁴⁷ Melissa Castan, 'The High Court and Human Rights: Contemporary Approaches' in Paula Gerber and Melissa Castan (eds), *Contemporary perspectives on human rights law in Australia* (Thomson Reuters (Professional) Australia, 2013) 71, 73.

⁴⁸ See generally Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-discrimination Law* (Federation Press, 2nd ed, 2014). The *Prohibition of Discrimination Act 1966* (SA) was the first such legislation in Australia.

⁴⁹ *Racial Discrimination Act 1975* (Cth).

⁵⁰ *Sex Discrimination Act 1984* (Cth).

⁵¹ *Disability Discrimination Act 1992* (Cth).

⁵² *Age Discrimination Act 2004* (Cth).

⁵³ See *Anti-Discrimination Act 1977* (NSW), *Equal Opportunity Act 1984* (SA), *Equal Opportunity Act 1984* (WA), *Discrimination Act 1991* (ACT), *Anti-Discrimination Act 1991* (Qld), *Anti-Discrimination Act 1996* (NT), *Anti-Discrimination Act 1998* (Tas), *Equal Opportunity Act 2010* (Vic).

⁵⁴ See, eg, Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 369.

⁵⁵ The AHRC is Australia's national human rights institution, administering the four federal anti-discrimination legislations. Similar bodies functioning at the States and Territories levels include the

identify various problems in substance and practice of these anti-discrimination laws. For example, Beth Gaze points out six interrelated problems, including weak substantive provisions, inadequacy to address multiple and unconscious discriminations, narrow interpretation by the judiciary, indeterminacy and incoherence of the underlying visions of equality, lack of ordering positive actions and failure to provide effective enforcement machinery and remedy.⁵⁶

Moreover, Australia adopted many other pieces of legislation providing various entitlements to people such as the *Fair Work Act 2009* (Cth),⁵⁷ the *Paid Parental Leave Act 2010* (Cth),⁵⁸ the *Criminal Code 1995* (Cth)⁵⁹ and the *Migration Act 1958* (Cth).⁶⁰ The statutory rights protected by these and other similar laws are broader in scope than those of the *Constitution*. Nonetheless, these statutory protections of rights have several shortcomings.⁶¹ For example, Debeljak points out four problems.⁶² First, these statutes can be easily repealed or amended by later legislation, either explicitly or by implication, underlining the fragile nature of rights protection. Second, compared to international treaty norms, the scope of statutory rights is much more narrow. Third, the courts generally interpret human rights legislations restrictively. Fourth, as the Commonwealth and States exercise overlapping jurisdiction over rights issues, there is a lack of uniformity in the statutory protection of rights.

Anti-Discrimination Board of NSW, the Anti-Discrimination Commission of the Northern Territory, the Anti-Discrimination Commission of Queensland, the Equal Opportunity Commission of South Australia, the Equal Opportunity Commission of Western Australia, the Human Rights Commission of the ACT, the Office of the Anti-Discrimination Commissioner of Tasmania and the Victorian Equal Opportunity and Human Rights Commission. Together these institutions form the Australian Council of Human Rights Agencies.

⁵⁶ Beth Gaze, 'Anti-discrimination Laws in Australia' in Paula Gerber and Melissa Castan (eds), *Contemporary perspectives on human rights law in Australia* (Thomson Reuters (Professional) Australia, 2013) 165, 179. Gaze writes:

[Anti-discrimination law in Australia] now lags well behind the law in comparable countries. It contains definitions, receives technical interpretations from the courts, and fails to provide an effective means for enforcement whether by the affected individuals or by a properly empowered and resourced agency. It has neglected to take up mechanisms that would allow a more proactive and systematic approach to be used in reducing discrimination and equality.

⁵⁷ *Fair Work Act 2009* (Cth).

⁵⁸ *Paid Parental Leave Act 2010* (Cth).

⁵⁹ *Criminal Code Act 1995* (Cth).

⁶⁰ *Migration Act 1958* (Cth).

⁶¹ See Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31(1) *Osgoode Hall Law Journal* 195, 213-18.

⁶² Debeljak, above n 48, 42.

Two Australian jurisdictions, the ACT and Victoria, have adopted non-entrenched,⁶³ statutory bills of rights, namely, the *Human Rights Act 2004* (ACT)⁶⁴ and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).⁶⁵ The two *Acts* similarly protect a set of human rights that are largely drawn from the *ICCPR*. Following the UK and New Zealand, the two *Acts* established the so-called ‘dialogue model’ of human rights protection.⁶⁶ The dialogue model seeks to facilitate discussion between the three arms of government without impairing the supreme legislative power of the Parliament.⁶⁷ In comparison to the two other arms of governance, the judiciary plays a weaker role in the dialogue model of human rights protection.⁶⁸

The Australian common law, which is founded on the English common law, protects several entitlements of individuals. However, there is no conclusive list of common law rights, instead there are compilations of cases, which collectively identify personal liberty, freedom of speech and movement, a fair trial, the presumption of innocence, the privilege against self-incrimination, freedom from arbitrary search and seizure, access to courts, legal professional privilege, procedural fairness and property rights.⁶⁹ Moreover, the judiciary has developed a set of principles to consider the norms of international human rights treaties in interpreting domestic laws, which I will discuss below. Nonetheless, the common law is a fragile vehicle for rights protection. Statutes are the most pervasive source of law in Australia and therefore, either Commonwealth or State legislation can override common law entitlements. Not all common law entitlements are

⁶³ Non-entrenched refers to the status of ordinary legislation. Although human rights are traditionally considered as constitutional issues, these two legislations are non-entrenched and therefore, they can be relatively easily repealed or amended by the Parliament.

⁶⁴ *Human Rights Act 2004* (ACT).

⁶⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁶⁶ See, eg, Byrnes et al, above n 35, 73-138; Carolyn Evans and Simon Evans, *Australian Bills of Rights: the Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis Butterworths, 2008); George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30(3) *Melbourne University Law Review* 880.

⁶⁷ The main features of this arrangement include: public authorities are obliged to act consistently with rights, proposed new legislation must be accompanied by a statement about its compatibility of human rights to ensure that rights are considered during the legislative process and drawn to public attention, and parliamentary committees are charged with responsibility of scrutinising proposed legislation by reference to the protected rights standards and reporting their conclusions to their respective legislatures.

⁶⁸ Courts are authorised to interpret legislation in compliance with the rights protected. Where legislation cannot be interpreted in a manner that is consistent with protected rights, courts may make a declaration to that effect. A declaration does not invalidate legislation, but it is intended to place public pressure on governments and parliament to consider legislative change.

⁶⁹ See James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008).

recognised as rights, at least for the purpose of statutory interpretation.⁷⁰ While common law entitlements can inform statutory interpretation, the judiciary only refer to them when legislation is ambiguous.⁷¹

In sum, the Australian legal protection of human rights is fragile, fragmented and inconsistent across jurisdictions.⁷² Melissa Castan summarises the situation as:

In short, we have an oft quoted ‘patchwork’ of human rights that gain the recognition and protection of the High Court. Some patches are old and worn but strong, others are fragile, some are newly sewn in. Some rights are omitted altogether, leaving gaps for those seeking protection.⁷³

At different stages, proposals were made to include human rights provisions in the *Constitution* or to adopt a national bill of rights.⁷⁴ The latest effort was the National Human Rights Consultation held in 2008.⁷⁵ Despite significant public engagement and support,⁷⁶ such proposals had never got enough political support.⁷⁷ Simply speaking, Australia has what Charlesworth described as a protracted ‘reluctance’ toward an idea of adopting a comprehensive legal protection of human rights.⁷⁸

2 *Institutional framework*

In the absence of a national bill of rights, rights protection in Australia is largely dependent on institutions and, thus, Australia’s system of human rights protection ‘cannot be fully appreciated until the institutions themselves are understood.’⁷⁹ The absence of a bill of rights is, first of all, justified by reference to the constitutional

⁷⁰ Saunders, above n 16, 268.

⁷¹ Ibid.

⁷² See Debeljak, above n 48; Saunders, above n 16, 265-74.

⁷³ Castan, above n 50, 73.

⁷⁴ See Byrnes et al, above n 35, 23-43; Charlesworth, above n 64, 197-201, 205-10.

⁷⁵ National Human Rights Consultation Committee, *Report of National Human Rights Consultation* (2009) 4-6. The Consultation made 31 recommendations including the enactment of a federal *Human Rights Act*.

⁷⁶ For example, the 2008 National Human Rights Consultation received more than 35 000 submissions, and over 87 per cent of submissions supported the enactment of a *Human Rights Act*.

⁷⁷ Australian Government, *Australia’s Human Rights Framework* (2010)

<<https://www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliasHumanRightsFramework.pdf>>. See also Philip Lynch, ‘Australia’s Human Rights Framework: Can There be Action without Accountability?’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters (Professional) Australia, 2013) 17.

⁷⁸ See Charlesworth, above n 64. Charlesworth argues that the politics of federalism and a dedication to legalism as the proper method of legal reasoning have produced a culture wary of rights discourse in Australia.

⁷⁹ Saunders, above n 16, 271.

principles of parliamentary sovereignty and responsible government. In accordance with these principles, Parliament is expected to legislate in accordance with the wishes of the majority of people. Further, Parliament ensures the executive government, which is formed from Parliament and whose Ministers are responsible to Parliament individually and collectively, acts in accordance with the wishes of the majority. A government who loses the confidence of a majority of the people is expected to be removed through free, periodic and compulsory elections. However, scholars see that the system practically allows populist majoritarian thinking to influence decisions, so that it is easy to circumscribe the human rights of minority groups, the marginalised or the unpopular, without alienating a popular majority.⁸⁰

Furthermore, the principle of responsible government is not constitutionally entrenched, but mostly ruled by conventions, and it is, therefore, adjusted in a variety of ways in response to changing political circumstances.⁸¹ On the limitations of the principle of responsible government to be a guarantee of human rights, Cheryl Saunders writes:

Even from the standpoint of the majority, however, this is a somewhat romantic view. Parliaments meet infrequently and pass large volumes of legislation at the behest of the executive government. Elected representatives have only a general appreciation of rights standards, which attract attention only in the most obvious cases. It is highly unlikely that an Australian government would be 'turned out' in midterm for any reason by a Parliament in which its supporters are in a majority and there is no evidence to suggest that lack of regard for rights would be particularly persuasive in this context. Infringement of rights by legislation in any event may be difficult to detect in the absence of a concrete case. Rights also may be infringed by executive, rather than legislative action, in the exercise of broad and general powers conferred by statute or, sometimes, in reliance on inherent executive power.⁸²

On occasion, Australia takes steps to improve the observance of human rights in the conduct of government. For example, in response to the above discussed National Human Rights Consultation of 2008, Australia adopted the *Human Rights*

⁸⁰ Debeljak, above n 48, 45 citing Lord Bingham, 'The Way We Live Now: Human Rights in the New Millennium' in Lord Bingham, *The Business of Judging* (Oxford University Press, 2000) 155, 156.

⁸¹ Saunders, above n 16, 263-64. See also Debeljak, above n 48, 44-8; Philip Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law, 1994).

⁸² Ibid 264 (citations omitted).

(*Parliamentary Scrutiny*) Act 2011 (Cth)⁸³ establishing the Parliamentary Joint Committee on Human Rights (the PJCHR).⁸⁴ Along with other parliamentary committees,⁸⁵ the PJCHR scrutinises the compatibility of bills, legislative instruments and existing legislation with human rights⁸⁶ and, as referred by the Attorney-General, examines any matter relating to human rights.⁸⁷ The Act also establishes a requirement that each bill that is introduced to Parliament be accompanied by a statement of compatibility.⁸⁸ However, thus far, the practical effects of this scrutiny regime seem to be rather slight.⁸⁹

The High Court exercises constitutional review over legislative action.⁹⁰ Through this power, the High Court has shaped the conduct of political institutions for more than a century.⁹¹ In 1978, a system of judicial review over administrative decisions was introduced.⁹² Yet, the role of the judiciary should be cautiously appreciated for rights protection. As mentioned, the judiciary plays a modest role in the constitutional

⁸³ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The term 'human rights' is defined in section 3(1) of the Act means 'the rights and freedoms recognised or declared' in core human rights treaties accepted by Australia.

⁸⁴ See Parliament of Australia, *Parliamentary Joint Committee on Human Rights* <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights>. The Committee was established on 13 March 2012 and consists of five members of the House and five Senators.

⁸⁵ The Senate Standing Committee on the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances scrutinise proposed and existing legislation to ensure, among other things, that they do not trespass unduly on personal rights and liberties. The Joint Standing Committee on Foreign Affairs, Defence and Trade considers and reports on matters relating to human rights internationally. The Joint Standing Committee on Treaties reviews and reports on action proposed by the Government on treaty ratification, including in relation to human rights treaties.

⁸⁶ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 7(a), 7(b).

⁸⁷ *Ibid* s 7(c).

⁸⁸ *Ibid* s 8(3). Sections 8(4) and (5) provides that statements are not binding on a court or tribunal and that a failure to prepare a statement does not affect the validity or operation of a Bill that becomes law.

⁸⁹ See, eg, George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 39. These authors write:

[T]he scrutiny regime is only very occasionally referred into parliamentary debate: a total of 106 times over the first four years of its operation. Nor has the Committee's impact been felt in terms of legislative outcomes: at least 73 per cent of the time (and according to insiders and commentators, a considerably higher percentage), the Committee's findings have had no effect at all on the form or fate of legislation that it has considered. Further, the regime's impact in the public sphere has been minimal, receiving an average of just three mentions in the media per month.

⁹⁰ *Australian Constitution* s 75. See also *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

⁹¹ See, eg, Enid M. Campbell and H. P. Lee, *The Australian Judiciary* (Cambridge University Press, 2012); Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books for the Australian Broadcasting Corporation, 2000).

⁹² *Administrative Decisions (Judicial Review) Act 1977* (Cth).

governance of Australia. In most areas of law, the effects of court judgments can be mitigated by legislation.⁹³ Practically also, the Australian judiciary avoids usurping the legislative authority of Parliament and tends to interpret laws narrowly.⁹⁴

Furthermore, Australia established a set of administrative institutions mandated to overseeing the legality of the conduct of government agencies in various areas of public life. The main such offices include the Australian Human Rights Commission (the AHRC),⁹⁵ the Ombudsman,⁹⁶ the Australian Information Commissioner⁹⁷ and the Fair Work Ombudsman⁹⁸ and the Fair Work Commission.⁹⁹ These institutions play significant roles in ensuring integrity and fairness in Australia. However, they generally function within limited mandates that are narrowly defined by law. Relatively robust NGOs, journalism and academia are also important components of Australian democracy, whose interactions may create synergy that leads to change for a serious human rights problem.¹⁰⁰

Some scholars claim that the Australian approach is ‘a model of sorts, where adequate human rights protection can be achieved without relying on extensive legal protection

⁹³ See generally Castan, above n 50.

⁹⁴ Ibid 91-4.

⁹⁵ The AHRC is Australia’s national human rights institution established under the *Australian Human Rights Commission Act 1986* (Cth) (*AHRC Act*). The *Disability Discrimination and Other Human Rights Amendment Act 2009* (Cth) made a number of changes to the *AHRC Act*, including renaming the Human Rights and Equal Opportunity Commission as the AHRC. See Australian Human Rights Commission, *About the Commission* <<http://www.humanrights.gov.au/about-commission-0>>. See also, above n 58.

⁹⁶ The *Ombudsman Act 1976* (Cth) establishes the Commonwealth Ombudsman. The Ombudsman considers complaints alleging unfair and unreasonable treatments or decisions of Australian Government agencies and prescribed private sector organisations, including Australia Post, Centrelink, Child Support and Department of Immigration and Border Protection. See Commonwealth Ombudsman, *What we do* (2015) <<http://www.ombudsman.gov.au/about/what-we-do>>.

⁹⁷ The Office of the Australian Information Commissioner (OAIC) functions under Attorney-General’s portfolio. The OAIC has three primary functions, including privacy functions under the *Privacy Act 1988* (Cth), freedom of information functions under the *Freedom of Information Act 1982* (Cth) and government information policy functions under the *Australian Information Commissioner Act 2010* (Cth). The OAIC investigates complaints about interferences with privacy and freedom of information from individuals against the Commonwealth and ACT government agencies and private sector organisations. See also Office of the Australian Information Commissioner, *About the OAIC* <<https://www.oaic.gov.au/about-us/>>.

⁹⁸ The Fair Work Ombudsman enforces the *Fair Work Act 2009* (Cth) and educates people about rights and responsibilities at work. See Fair Work Ombudsman, *Our role* <www.fairwork.gov.au/about-us/our-role>.

⁹⁹ The Fair Work Commission is Australia’s national workplace relations tribunal. It carries out a range of functions and enforces numerous laws related to workplace relations, including the *Fair Work Act 2009* (Cth) and *Fair Work Regulations 2009* (Cth). See Fair Work Commission, *Legislation and regulations* (6 December 2016) <www.fwc.gov.au/about-us/legislation-regulations-0>.

¹⁰⁰ Saunders, above n 16, 273.

of human rights.’¹⁰¹ In terms of the well-being of the majority of its population, Australia has not fallen behind other countries.¹⁰² However, it is not free of serious problems of social inequality. Those who are positioned in the margins of society and have no influence in politics are especially at risk of falling through gaps in Australian rights protection.

C *Australian approach to international treaties*

1 *Domestic application of human rights treaties*

As a founding member, Australia has a longstanding history of supporting the UN.¹⁰³ It has been actively involved in the core functions of the UN, including peacekeeping, economic and social development, humanitarian assistance and environmental sustainability. Since the adoption of the *UDHR*, Australia actively contributes to drafting human rights treaties.¹⁰⁴ Australia is also a party to numerous treaties relating to human rights. In particular, Australia has accepted seven core human rights treaties¹⁰⁵ and five optional protocols to those treaties.¹⁰⁶ A total of 50 ILO conventions and one

¹⁰¹ McBeth et al, above n 57, 343.

¹⁰² For example, Australia consistently ranked higher in Better Life Index of the Organisation for Economic Co-operation and Development (OECD). According to the 2017 OECD Economic Survey of Australia, the average household net-adjusted disposable income per capita is US \$33 417 per year, which is more than the OECD average of US \$30 563 per year. Around 72 per cent of people aged 15 to 64 in Australia have a paid job, above the OECD employment average of 67 per cent. 80 per cent of adults aged 25-64 have completed upper secondary education, higher than OECD average of 75 per cent. Life expectancy at birth in Australia is around 83 years, which is three years higher than OECD average of 80 years. In general, Australians are more satisfied with their lives than the OECD average. Australians rated their overall satisfaction with life as 7.3 within a scale from 0 to 10, which counts higher than the OECD average of 6.5. See Organisation for Economic Co-operation and Development, *Better Life Index: Australia* (March 2017) <<http://www.oecdbetterlifeindex.org/countries/australia/>>.

¹⁰³ See, eg, Kate Eastman, 'Australia's Engagement with the United Nations' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters (Professional) Australia, 2013) 97; United Nations Association of Australia, *Australia and the UN* (2016) <<http://www.unaa.org.au/learn/australia-and-the-un/>>. Australia served on the Security Council in 1946-7, 1956-7, 1973-4, 1985-6 and 2013-4, and held the first Presidency of the Security Council in 1946, and it is the 13th largest contributor to the UN budget.

¹⁰⁴ See Annemarie Devereux, *Australia and the Birth of the International Bill of Human Rights 1946-1966* (Federation Press, 2005) 17, 27-113.

¹⁰⁵ Australia is a party to the following core human rights treaties: *ICERD*, *ICESCR*, *ICCPR*, *CEDAW*, *CAT*, *CRC*, *Disabilities Convention*.

¹⁰⁶ Australia accepted following Optional Protocols to the core human rights treaties: *Optional Protocol to the Disabilities Convention*, *ICCPR-OP-I*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991) (*ICCPR-OP-II*), *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, opened for signature 25 May 2000, 2173 UNTS 222 (entered into force 12 February 2002) (*CRC-OP-AC*), *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*,

protocol, including seven out of eight fundamental conventions, were also ratified by Australia.¹⁰⁷ Moreover, it is party to several other treaties relating to human rights.¹⁰⁸ However, the Australian approach to the international human rights regime has been rather inconsistent.¹⁰⁹ At some stages, Australia has been an energetic supporter of the international human rights regime. At other times, Australia has retreated from its commitments and even displayed hostility to the regime. Regarding this, Annemarie Devereux, who investigated Australia's engagement with the regime in the years of 1946-66, writes, 'there was no inevitability about Australia's acceptance of the current international human rights regime.'¹¹⁰

opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002) (*CRC-OP-SC*), *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 6 October 1999, 2131 UNTS 83 (entered into force 22 December 2000) (*OP-CEDAW*), *OP-CAT*, opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006).

¹⁰⁷ See International Labour Organization, *NORMLEX Information System on International Labour Standards: Ratification for Australia* (January 2017)

<http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102544>. The fundamental conventions, which Australia is party, include the *Freedom of Association and Protection of the Rights to Organise Convention*, opened for signature 9 July 1948, ILO Convention No 87 (entered into force 4 July 1950) (*ILO Convention No 87*), *Right to Organise and Collective Bargaining Convention*, opened for signature 1 July 1949, ILO Convention No 98 (entered into force 18 July 1951) (*ILO Convention No 98*), *Forced Labour Convention*, opened for signature 28 June 1930, ILO Convention No 29 (entered into force 1 May 1932) (*ILO Convention No 29*), *Abolition of Forced Labour Convention*, opened for signature 25 June 1957, ILO Convention No 105 (entered into force 17 January 1959) (*ILO Convention No 105*), *Equal Remuneration Convention*, opened for signature 29 June 1951, ILO Convention No 100 (entered into force 23 May 1953) (*ILO Convention No 100*), *Discrimination (Employment and Occupation) Convention*, opened for signature 25 June 1958, ILO Convention No 111 (entered into force 15 June 1960) (*ILO Convention No 111*), *Worst Forms of Child Labour Convention*, opened for signature 17 June 1999, ILO Convention No 182 (entered into force 19 November 2000) (*ILO Convention No 182*).

¹⁰⁸ These treaties include, but not limited to, *Rome Statute, Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) (*Genocide Convention*), *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003), *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime*, opened for signature 15 November 2000, 2241 UNTS 570 (entered into force 28 January 2004), *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organised Crime*, opened for signature 31 May 2001, 2326 UNTS 208 (entered into force 3 July 2005), *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), *Convention on Stateless Persons*, opened for signature 28 September 1964, 360 UNTS 117 (entered into force 6 June 1960), *UNESCO Convention against Discrimination in Education*, opened for signature 15 December 1960 (entered into force 22 May 1962) (*UNESCO Discrimination Convention*).

¹⁰⁹ See Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 432-34; Spencer Zifcak, 'The New Anti-Internationalism: Australia and the United Nations Human Rights Treaty System' (Discussion Paper No 54, The Australia Institute, 2003).

¹¹⁰ See Devereux, above n 107, 233.

Australia incorporates its international treaty obligations in an inconsistent and sporadic manner. Human rights treaties have prompted numerous legislative reforms in Australia.¹¹¹ These include the *Australian Human Rights Commission Act 1986* (Cth),¹¹² the *Native Title Act 1993* (Cth),¹¹³ the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth),¹¹⁴ the *Workplace Relations Act 1996* (Cth),¹¹⁵ the *Industrial Relations Reform Act 1993* (Cth),¹¹⁶ the *Commonwealth and NSW Evidence Act 1995* (Cth),¹¹⁷ and the *Sex Discrimination Act 1984* (Cth).¹¹⁸ Moreover, the prohibition of some human rights violations during an armed conflict was implemented by the *Geneva Conventions Act 1957* (Cth).¹¹⁹ The *Rome Statute* was implemented into Australian law, incorporating the crimes of genocide, crimes against humanity and war crimes into the *Criminal Code Act 1995* (Cth)¹²⁰ through the *International Criminal Court (Consequential Amendments) Act 2002* (Cth).¹²¹ At the same time, Australian governments have been slow to fully incorporate human rights treaty obligations into domestic laws. The *International Bill of Rights* has never been incorporated fully in the Australian legal order. Moreover, Australia made a number of reservations¹²² and interpretative declarations to the ratified human rights treaties.¹²³ The failure to fully

¹¹¹ See Christof H. Heyns and Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Kluwer Law International, 2002) 17.

¹¹² *Australian Human Rights Commission Act 1986* (Cth) (*AHRC Act*). The AHRC Act (formerly the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)) incorporates some articles of the CERD, CCPR and CRC.

¹¹³ *Native Title Act 1993* (Cth). The adoption of the *Native Title Act 1993* (Cth) is triggered by the CERD and the CESC.

¹¹⁴ *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). The Act implements the CERD and the CESC.

¹¹⁵ *Workplace Relations Act 1996* (Cth). This Act implements some obligations under the CEDAW and the CESC.

¹¹⁶ *Industrial Relations Reform Act 1993* (Cth). The adoption of the Act is induced by the CEDAW and the CESC.

¹¹⁷ *Commonwealth and NSW Evidence Act 1995* (Cth). This Act implements the ICCPR.

¹¹⁸ *Sex Discrimination Act 1984* (Cth). The Act incorporated the CEDAW.

¹¹⁹ *Geneva Conventions Act 1957* (Cth).

¹²⁰ *Criminal Code Act 1995* (Cth).

¹²¹ *International Criminal Court (Consequential Amendments) Act 2002* (Cth).

¹²² Australia made reservations to articles 10(2)(a) and (b) and (3), 14(6) and 20 of ICCPR, article 4(a) of ICERD, article 11(2) of CEDAW and article 37(c) of CRC. See International Human Rights Instruments, *Core Document Forming Part of Reports of States Parties: Australia*, HRI/CORE/AUS/2007 (7 August 2007) 132.

¹²³ Australia issued interpretative declarations to the *Disabilities Convention* and article 3 of the *OP-CRC-AC*. Interpretive declarations to the *Disabilities Convention* are discussed in Part III of Chapter Six.

incorporate its human rights obligations in domestic law has made Australia subject to repeated criticisms in the UN human rights regime.¹²⁴

As mentioned before, the *Australian Constitution* makes little provision as regards the relationship between international and domestic law.¹²⁵ Instead, the High Court developed a set of principles, determining the application of international treaties in the Australian legal order.¹²⁶ Most fundamentally, there is a well-established common law principle stipulating that provisions of an international treaty, to which Australia is a party, do not form part of domestic law unless those provisions are incorporated by an act of Parliament.¹²⁷ However, there are some exceptions to this rule, allowing limited influence of international treaties on the domestic legal system.

In *Mabo v Queensland*, the High Court held that, although Australian common law is not necessarily consistent with international law, ‘international law is a legitimate and important influence on the common law, especially when international law declares the existence of universal human rights.’¹²⁸ In the *Teoh* case, a majority of the High Court accepted that the mere ratification of the *CRC* was sufficient to create a legitimate expectation that public officials would normally act in accordance with it, even though a

¹²⁴ See discussions in the section below. For example, the CEDAW Committee notes that:

[The Committee] remains concerned about the lack of harmonization or consistency in the way that the Convention is incorporated and implemented across the country, particularly when the primary competence to address a particular issue lies with the individual states and territories... The Committee reiterates its previous recommendation that the State party promote and guarantee the implementation of the Convention throughout the country, including through its power to legislate for the implementation of treaty obligations in all states and territories.

Committee on the Elimination of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc CEDAW/C/AUS/CO/7 (30 July 2010) paras 16-7.

¹²⁵ See Charlesworth et al, above note 112, 430. These authors point out two reasons for the constitutional silence on the relationship between international and Australian law. First, the drafters avoided including a provision that might suggest Australia was entitled to enter into treaties on its own behalf as, at that time, the British government had control over Australia’s foreign relation. Second, when the *Australian Constitution* was adopted, there was a dominant perception that international law was not law, but a set of discretionary norms that states could neglect at will.

¹²⁶ Ibid 446-63.

¹²⁷ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168. See also Charlesworth above n 112, 447-50. In general, domestic implementation of Australia’s international obligations can occur through the introduction of specific implementing legislation; through reliance on existing Commonwealth or state legislation or, where a treaty imposes obligations only on the executive, through administrative measures made under the executive power.

¹²⁸ *Mabo v Queensland* (No 2)(1992) 175 CLR 1, 42.

treaty provision was not incorporated into Australian laws.¹²⁹ But none of these principles are conclusive. The *Teoh* principle, although it inspired significant changes in other jurisdictions,¹³⁰ is much debated in Australia.¹³¹ Immediately after the *Teoh* decision, the Commonwealth Attorney-General and Minister for Foreign Affairs made a joint statement, declaring that ‘the ratification of a treaty had not ever been and was not now intended to be capable of generating any form of legitimate expectation on the part of administrative officials in the federal government.’¹³² In 2003, the High Court indicated its potential departure from the *Teoh* principle.¹³³ Generally, as Saunders writes, the Australian judiciary avoids offering a backdoor mean of treaty incorporation and acts with ‘due circumspection’ in developing common law by reference to international treaties.¹³⁴

2 Treaty making and implementation process

The Commonwealth government has exclusive power to assume international obligations on behalf of Australia¹³⁵ and the Commonwealth Parliament possesses the power to legislate with respect to external affairs.¹³⁶ The scope of the external affairs power was originally unclear,¹³⁷ but it was solidified first in *Koowarta v Bjelke-Petersen*¹³⁸ and then in *Commonwealth v Tasmania* (Tasmanian Dam) cases.¹³⁹ In

¹²⁹ *Minister for Immigration and Multicultural Affairs v Teoh* (1995) 183 CLR 273. In the case, Mason CJ and Deane J reasoned that such an expectation could arise because:

[R]atification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the *Convention*. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the *Convention*.

Ibid 291.

¹³⁰ The Indian Supreme Court and superior courts in the UK and New Zealand followed the *Teoh* principle. See Brian Burdekin, *National Human Rights Institutions in the Asia-Pacific Region* (Martinus Nijhoff Publishers, 2007) 71.

¹³¹ See, eg, Matthew Groves, ‘Treaties and Legitimate Expectations - The Rise and Fall of *Teoh* in Australia’ (2010) 15(4) *Judicial Review* 323.

¹³² See Minister for Foreign Affairs, Senator Gareth Evans and the Attorney-General, Michael Lavarch, ‘International Treaties and the High Court Decision in *Teoh*’ (Joint Statement, 10 May 1995) <<http://foreignminister.gov.au/releases/1995/m44.html>>.

¹³³ *Minister for Immigration and Multicultural Affairs, Ex Parte Lam* (2003) 214 CLR 1.

¹³⁴ Saunders, above n 16, 271.

¹³⁵ *Australian Constitution* s 61.

¹³⁶ Ibid s 51(xxix).

¹³⁷ See, eg, *R v Burgess, Ex Parte Henry* (1936) 55 CLR 608.

¹³⁸ *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168. In *Koowarta* case, Ministers of the Queensland government contested the validity of the *Racial Discrimination Act 1975* (Cth), which incorporates the

Tasmanian Dam case, the external affairs power has been interpreted broadly by the High Court, enabling a Parliament to pass laws in any area including those that have traditionally fallen under the jurisdiction of States and Territories. As mentioned, a number of domestic legal reforms such as anti-discrimination laws have been achieved through the external affairs power. The power also enables the Commonwealth Parliament to override State and Territory laws that are inconsistent with international treaties, even though the Parliament rarely exercises this power in practice.¹⁴⁰ It should also be noted that the exercise of the power to legislate for external affairs is subject to several conditions.¹⁴¹

While the Commonwealth Parliament legislates for external affairs, decisions concerning treaty negotiations including the determination of objectives, negotiating positions, the parameters within which the Australian delegation can operate, and the final decision as to whether to ratify a treaty are made by the executive.¹⁴² Not only does the executive government control the negotiation and ratification of treaties, it also determines whether legislative measures are needed in order to comply with treaty obligations.¹⁴³ As set out in various government documents, it is generally assumed that government does not enter into international treaties on behalf of Australia unless they

ICERD in the Australian legal order, alleging that the enactment of such legislation was unconstitutional. High Court disagreed and upheld the constitutional validity of the Act. The minority view was that the Commonwealth Parliament can only legislate for external affairs, when the subject matter of the treaty falls within the areas that it can legislate.

¹³⁹ *Commonwealth v Tasmania* (1983) 158 CLR 1. In the Tasmanian Dam case a majority of the High Court confirmed that the external affairs power confers the Commonwealth Parliament to legislate for any matters. This principle was also upheld in *Richardson v Forestry Commission* case. *Richardson v Forestry Commission* (1988) 164 CLR 261.

¹⁴⁰ See McBeth et al, above n 57, 347. According to these authors, the only exception was the proposed *Human Rights (Sexual Conduct) Act 1994* (Cth) that nullifies a Tasmanian law that criminalised consensual homosexual sex. The *Human Rights (Sexual Conduct) Act 1994* (Cth) implements the first communication against Australia that was dealt by a UN human rights treaty body, the Toonen case. Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (30 March 1994) (*Toonen v Australia*). In the *Toonen* case, the HRC found that anti-sodomy law of Tasmania was in breach of privacy rights protected under the ICCPR.

¹⁴¹ First, the treaty must be reasonably specific about the steps necessary to implement the obligations it creates, and the law must be similarly specific in the regime it establishes to give effect to the treaty. Second, the domestic law is valid only to the extent that it gives effect to the treaty. See McBeth et al, above n 57, 345.

¹⁴² Charlesworth et al, above n 4, 37.

¹⁴³ *Ibid* 38. The responsibilities to determine whether existing legislation is sufficient, or new legislation is necessary, to give effect to a treaty lie with the Commonwealth Attorney General's Department.

are satisfied that domestic laws are in compliance with treaty norms.¹⁴⁴ With regard to the conclusion of international treaties, there is no constitutional duty for government to consult with the Parliament or the people.¹⁴⁵

Until recently, the Australian Parliament, although it determines the form and content of legislation that incorporates international treaty norms into domestic laws, did not have any formal role in treaty making processes. In 1996, following a Senate inquiry into the matter, Australia introduced several mechanisms to address Parliament's lack of a role in treaty-making processes.¹⁴⁶ Under this arrangement, with exceptions for urgent or sensitive treaties, all treaties are tabled in both Houses of Parliament for at least fifteen sitting days prior to binding treaty action being taken. Treaties are tabled in the Parliament with a National Interest Analysis (NIA), which outlines the reasons why Australia should become a party to the treaty and discusses economic, environmental, social and cultural effects of the proposed treaty action as well as the process of consultation that government has carried out regarding the treaty action.¹⁴⁷

Another important element of the 1996 reform was the creation of the Joint Standing Committee on Treaties (JSCOT) in the Commonwealth Parliament.¹⁴⁸ The JSCOT inquire into and report upon matters arising from treaties and proposed treaty actions presented and deemed to be presented to Parliament, any questions relating to a treaty or any other international instrument that are referred to the Committee by either House of Parliament or a Minister. In exercising its mandates, the JSCOT can also hold a public consultation and receive submissions and evidences. However, these mechanisms do not constrain the executive government in deciding whether or not to ratify a treaty.¹⁴⁹

¹⁴⁴ See Department of Foreign Affairs and Trade, *Australia and International Treaty Making Information Kit* (July, 2000) (*Treaty Making Information Kit*)

<<http://www.austlii.edu.au/au/other/dfat/reports/infokit.html#sect1>>.

¹⁴⁵ Charlesworth et al, above n 4, 37.

¹⁴⁶ Ibid 41-8. See also the Senate, Legal and Constitutional Affairs Reference Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995).

¹⁴⁷ However, the significance of the NIA should be cautiously noted. According to Charlesworth et al, the NIA is not a detailed document and contains little analysis on the impact of a treaty. See Charlesworth et al, above n 4, 42.

¹⁴⁸ See Parliament of Australia, *Joint Standing Committee on Treaties*
<http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties>.

¹⁴⁹ See Charlesworth et al, above n 4, 45-8.

The federal system has implications for the implementation of Australia's international obligations. In ratifying the *ICCPR* in 1980, Australia declared that it has a federal constitutional system and 'the implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.'¹⁵⁰ This position was iterated in its periodic reports to the treaty monitoring bodies. Consistently with the declaration, the Commonwealth Parliament often declined to overrule the State and Territory laws that are inconsistent with Australia's treaty obligations.¹⁵¹ But rather the Commonwealth government seeks to give effect to its international obligations through consensus between the two levels of government.¹⁵² Given that the Commonwealth Parliament legislates in specific areas, while the State and Territory Parliaments exercise a plenary legislative power, the inclination results in uneven legal incorporation of Australia's treaty obligations, which the above section describes.¹⁵³ In order to facilitate dialogue between the two levels of governments, COAG established the Treaties Council in 1994. However, the Council made up of Prime Minister and all premier and chief ministers that is scheduled to meet at least once a year has disappeared from public view.¹⁵⁴

III MONGOLIA

A *Mongolia in the 20th century*

Mongolians see the *Hünnü* (Huns) as their ancestors.¹⁵⁵ As such, the *Hünnü* polity that is believed having existed in the territory of what is now Mongolia from around 209BC

¹⁵⁰ United Nations Treaty Collection, *International Covenant on Civil and Political Rights: Australia Declaration* (7 March 2018) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtldsg_no=IV-4&chapter=4&clang=_en#14>.

¹⁵¹ See especially Charlesworth, above n 64, 218-23.

¹⁵² *Treaty Making Information Kit*, above n 148.

¹⁵³ See section II(C)(1).

¹⁵⁴ See Charlesworth et al, above n 4, 56. According to these scholars, the Treaties Council met only once in November 1997 in the period of 1994-2006. These authors conclude that the Council was the least successful aspect of the 1996 reform and write '[i]t is not clear why the Treaties Council has not been more active, particularly as adequate and timely consultation with the states is one of the sensitive areas in Australian treaty-making practice.' The Council's website was removed from the COAG website as of May 2017.

¹⁵⁵ Alan J.K. Sanders, *Historical Dictionary of Mongolia* (Scarecrow Press, 3rd ed, 2010) 5-6. The lineage of the *Hünnü* and the Mongols is not fully resolved. Much is known about the *Hünnü* from Chinese sources, where they are called the *Xiongnu*. However, two facts are known about the *Hünnü*. First, *Hünnü* were the nomadic people, who resided in the territory of Mongolia. Some *Hünnü* words (recorded in Chinese sources) suggest that their language is related to the Mongolian language. The

to 93AD is commonly believed as the birth of Mongol statehood.¹⁵⁶ In the 13th century, under the rule of *Chinggis Haan* and his successors, the Mongol empire (1206-1368) was established. The legacies of the Mongol empire significantly inform the identities of Mongols, albeit contentiously.¹⁵⁷ In the following centuries, the Mongol empire was divided into three parts, inner, outer and west or Oirad Mongols.¹⁵⁸ By the 17th century, all Mongol constituencies came under the rule of the *Manchu*'s Qing dynasty. As the Qing dynasty weakened, the northern part of Mongolia (Outer Mongolia) declared its independence, proclaiming the *Olnoo Orgogdson Mongol Ulus* (The Commonly Elevated State of Mongolia) on 29 December 1911.¹⁵⁹ The ninth incarnation of the *Bogd Gegeen* (*Holy Bogd*), the head of Mongolian Buddhist hierarchy, was enthroned as the monarch (renamed *Bogd Haan* on enthroning) and ruled the country on the advice of two-chambered *Hural* (Assembly).

At the dawn of the 20th century, Mongolia was an agrarian, feudal society that was deeply engrained in Tibetan Buddhism.¹⁶⁰ According to the first census, in 1918, the total population of the country was 647 504.¹⁶¹ Society consisted of the princes

Hünnü are believed to be the ancestors of the Huns, who ravaged the Europe in the fourth and fifth century. In the 18th century, a French scholar, Joseph de Guignes, first proposed a link between the Huns and the *Hünnu* people.

¹⁵⁶ Government of Mongolia, *On the 2220th Anniversary of the Hünnü Statehood*, Resolution No 314 of 2010, 1 December 2010.

¹⁵⁷ See, eg, Christopher Kaplonski, *Truth, History and Politics in Mongolia: The Memory of Heroes* (Routledge, 2004); Bulag E. Uradyn, *Collaborative Nationalism: The Politics of Friendship on China's Mongolian Frontier* (Rowman & Littlefield Publishers, 2010); Orhon Myadar and James Deshaw Rae, 'Territorializing National Identity in Post-Socialist Mongolia: Purity, Authenticity and Chinggis Khaan' (2015) 55(5) *Eurasian Geography and Economics* 560.

¹⁵⁸ After the collapse of the Yuan Dynasty, which was the last of the Mongol Empire that was seated in Beijing, the Mongols retreated to their homeland in the north and then divided into two major groups, East Mongol and West or Oirad Mongol. Later, East Mongol divided into Inner and Outer Mongol. The Manchus subjugated Inner Mongolia in 1636, Outer Mongolia 1691 and West Mongolia in 1757.

¹⁵⁹ See Batbayar Tsedendamba and Sharad K. Soni, *Modern Mongolia: A Concise History* (Pentagon Press, 3rd ed, 2007) 4-13. The new government sought to unite the all parts of Mongolia. In August 1912, the Mongol army discharged the Manchu *amban said* (an ambassador or a representative governor) from *Hovd* city and West Mongolia joined Outer Mongolia. A fight against the Chinese government, who overthrew the Manchu dynasty in December 1911, broke in Inner Mongolia in the autumn of 1912. Despite several attempts of reunion with Outer Mongolia that continued until 1940s, Inner Mongolia remained as a part of China.

¹⁶⁰ See Batbayar (Baabar) Bat-Erdene and Christopher Kaplonski, *Twentieth Century Mongolia* (Global Oriental, 2005) 97-100. The *Manchu* ruled Outer Mongolia differently from Inner Mongolia. Outer Mongolia submitted to the *Manchu* on the basis of the *Dolonnur Treaty* (1691). The treaty, among other things, prohibited *Han* Chinese people to settle in Outer Mongolia in order to protect Mongol ethnicity, culture and language. At the same time, the *Manchu* promoted Tibetan Buddhism in Outer Mongolia, partly as a political tool to stabilise and pacify the belligerent behaviour of Mongols.

¹⁶¹ Paula L.W. Sabloff, *Does Everyone Want Democracy? Insights from Mongolia* (Left Coast Press Inc., 2013) 42. Sabloff, quoting Ivan Maiskii, estimated that the total population residing in Mongolia was 647

(*Chinggis Haan* descendants), nobles, commoners, lamas and serfs.¹⁶² A low population density and herding economy produced few urban centres in Mongolia. The only major settlement was *Ih Hüree* (nowadays Ulaanbaatar), which was founded as a mobile city in 1641, grew as a monastic settlement in 1778, and became an administrative, religious and trade centre of Mongolia by the 1800s.¹⁶³

In 1919, the Chinese army defeated *Olnoo Orgogdson Mongol Ulus* and removed *Bogd Haan* from the power. The invasion stimulated Mongolian nationalism and resulted in the forming of secret revolutionary groups in *Ih Hüree*.¹⁶⁴ In June 1920, on the advice of pro-Bolshevik Russians residing in *Ih Hüree*, two revolutionary groups merged into the *Mongol Ardyn Nam* (Mongolian People's Party (MPP)).¹⁶⁵ The MPP, with the covert endorsement of *Bogd Haan*, sent a delegation to Soviet Russia and sought monetary and weapon's assistance to defeat the Chinese army. In July 1921, a joint Mongol-Soviet force arrived in *Ih Hüree* and restored Mongolia's independence. A few days later, the *Ardyn Zasag* (the Commoners' government) was formed and reinstituted *Bogd Haan* as the constitutional monarch. However, *Bogd Haan's* power was restricted only to religious matters and his secular powers were transferred to *Ardyn Zasag*.¹⁶⁶

504. This does not include the *Hovd* region, which he estimates at 50 000, the *Huvsgul* region occupied by the Bogd Khan's *shabi* (estimated at 16 000) or resident foreigners (100 000 Chinese, 5 000 Russians and some Westerners). Among the reported 257 446 male population in the four eastern provinces, 5.7 per cent were princes and nobles, 42.8 per cent were commoners and serfs and 44.6 per cent were Buddhist lamas.

¹⁶² Ibid 34. The Mongolian serfs were pastoral nomads, who followed the herds of their lords from one pasture to the next cycling through familiar pastures over the course of a year enjoying greater freedom in organising their daily lives with minimal interference from their lords.

¹⁶³ See, eg, Alicia Campi, 'The Rise of Cities in Nomadic Mongolia' in Ole Bruun and Li Narangoa (eds), *Mongols from Country to City: Floating Boundaries, Pastoralism and City Life in the Mongol Lands* (Nordic Institute of Asian Studies, 2006) 21. By 1918, the resident population of *Ih Hüree* was around 100 000. Two other provincial towns, *Hovd* and *Uliastai*, grew in the late 19th century. The former first developed as a farming village in the 17th century and later became *Manchu* fortress. *Uliastai* was founded as a *Manchu* fortress, but soon became a Tibetan Buddhist centre. Both towns had approximately 3000 people.

¹⁶⁴ Tsedendamba and Soni, above n 164, 22.

¹⁶⁵ See Bat-Erdene and Kaplonski, above n 165, 189-215. The 'Party Oath', consisting of an introduction and nine articles, stated the primary objective of the Outer Mongolian People's Party was 'to liquidate the foreign enemy which is hostile to our religion and race, to restore lost rights and truly revive the state and religion, to improve sincerely the internal government, to give total attention to the interests of the poor and lowly masses and to live neither oppressing nor oppressed.' According to Bat-Erdene and Kaplonski, the highest goal of the Party was to unite all Mongolian regions. See also Tsedendamba and Soni, above n 164, 21-9.

¹⁶⁶ On 1 November 1921, the *Oath Agreement* was concluded between *Bogd Haan* and the People's government. The *Bogd Haan* served as the head of state until his death in 1924, while the government exercised legislative, executive and judicial power.

After the mysterious death of the *Bogd Haan* in 1924, the People's Great *Hural* was convened. It adopted the *Inaugural Constitution of the Mongolian People's Republic 1924* (the *1924 Constitution*).¹⁶⁷ The *1924 Constitution* proclaimed the Mongolian People's Republic (MPR) and declared that the country would develop in a non-capitalist way.¹⁶⁸ Signalling the transformative changes coming to the country, *Ih Hüree* was renamed as *Ulaanbaatar* (Red Hero) and the MPP changed its name to the Mongolian People's Revolutionary Party (MPRP) at that *Hural*. So the Mongolian socialist transformation began, which continued for seven more decades.

The *1924 Constitution* separated religion from the state and abolished the titles of the lamas. While the commoners were elevated, nobles were prohibited from participating in governance. Between 1933 and 1953, Mongolia was terrorised by a storm of arbitrary arrest and mass murder of political leaders, former nobles, lamas and ordinary people. When the purge peaked in 1937-1939, 20 039 people, including 17 000 lamas were executed and another 5 700 jailed out of around 57 000 people arrested.¹⁶⁹ The political oppression continued in one form or another until 1980s. Despite massive efforts to eradicate economic and social differences among people, social classification was never eliminated as new elites emerged from the Party.¹⁷⁰ Along with strong communist propaganda, a tight control was placed on political, cultural and religious practices. Periodic elections were held, but often there was only one candidate to vote for. State interference with private life was the social norm. People were told what to study, where to work, what to wear and how to organise a family.

Meanwhile, the livelihood and welfare of the majority of the population have improved. The Mongolian population grew at a phenomenal rate between 1925 and 1989, when the growth almost tripled from 684 000 to 2.04 million.¹⁷¹ As industries developed,¹⁷²

¹⁶⁷ Бүгд Найрамдах Монгол Улсын анхдугаар Үндсэн хууль [The Inaugural Constitution of the Mongolian People's Republic] (Mongolia) adopted on 26 November 1924 (*1924 Constitution*).

¹⁶⁸ Ibid art 14.

¹⁶⁹ See Tsedendamba and Soni, above n 164, 41-3.

¹⁷⁰ See Robert Arthur Rupen, *How Mongolia is really ruled: A Political History of the Mongolian People's Republic 1900-1978* (Stanford University Press, 1979) 117-21. Three kinds of elite arose in the socialist society including the governing elite, the urban intelligentsia and the military elite. Rupen estimated the national elite at 500 people by the 1970s.

¹⁷¹ Tsedendamba and Soni, above n 164, 96. The annual growth rate was about 2.7 per cent, which sustained in 1960-80. The rapid population growth creates a young population in Mongolia.

Mongolia urbanised significantly. By 1989, about 60 per cent of the population lived in urban areas.¹⁷³ Rural life was entirely transformed as more than 300 *sums* (rural districts) grew in relation to the expansion of the collectives and state farms.¹⁷⁴ Each sum centre had a school, medical clinic, post office, collective headquarter, local government offices, cultural palace and cinema, shops and cafes, and residential buildings providing basic social services to residents. Social services and the cultural industry developed rapidly. From their introduction, medical care and education were provided free of charge.

In 1921, only about one per cent of the adult population was literate. The figures increased sharply to 87 per cent in 1951, 92 per cent in 1952, and by 1968, Mongolia claimed to have achieved universal adult literacy.¹⁷⁵ The first modern hospital was opened in 1925; by in 1987, Mongolia had 423 hospitals and 538 outpatient clinics.¹⁷⁶ Life expectancy reached about 67 years, as compared to under 25 before 1921.¹⁷⁷ In 1981, Mongolia claimed to have eliminated common infectious diseases.¹⁷⁸ Social security and social insurance benefits were offered for temporary or permanent

¹⁷² Ibid. The first factory was opened in 1933 and small craft shops were transformed to factories in 1950s. By 1939, there were about 10 000 industrial workers and another 10 000 in handicraft operations. By 1973, the industrial force had 110 000 workers.

¹⁷³ Ibid 98. In 1969-79, the population of Ulaanbaatar increased by 135 000, of whom 50 000 or 37 per cent were migrants from rural areas. By 1985, Ulaanbaatar housed over a half million people, which is a quarter of the nation. Several other industrial cities were built with enormous investment from the USSR. The industrial centre of Darhan in the north of Ulaanbaatar had 85 700 people in 1989. Erdenet was founded in 1976, built around a major copper and molybdenum mining complex, it had a population of 56 100. Choibalsan was the fourth largest city housing around 40 000 people in 1989. See also David Sneath, 'The Rural and the Urban in Pastoral Mongolia' in Ole Bruun and Li Narangoa (eds), *Mongols from Country to City: Floating Boundaries, Pastoralism and City Life in the Mongol Lands*, NIAS studies in Asian topics (Nordic Institute of Asian Studies, 2006) vol 34, 140, 147.

¹⁷⁴ Tsendendamba and Soni, above n 164, 102. Since its early days, the socialist government attempted to collectivise the herders. With an unsuccessful attempt in 1930s and a long delay, 99 per cent of herds had been collectivised by 1960s. Since 1959, farming of wheat and vegetables, which still was not popular among Mongolians, developed rapidly. As a result of the agricultural developments, rural townships were established in great numbers.

¹⁷⁵ Ibid 99. The first secular school opened in 1923. The National University of Mongolia was established in 1942. Soon after, medical, technical, pedagogical and agricultural universities were founded. In 1979, among 492 600 urban people receiving education, people with higher education numbered 42 800, people with a secondary or specialised secondary education totalled 111 500 and those with an incomplete secondary or primary education numbered 338 300. A decade later, those with higher education numbered 87 500, people with secondary or specialised secondary equalling 250 000, and those with an incomplete secondary or primary education numbering 444 100.

¹⁷⁶ Sabloff, above n 166, 56.

¹⁷⁷ William E. Butler (ed), *The Mongolian Legal System: Contemporary Legislation and Documentation* (Martinus Nijhoff Publishers, 1982) 462.

¹⁷⁸ Robert L. Worden and Andrea Matles Savada, *Mongolia: A Country Study* (GPO for the Library of Congress, 1989) <<http://countrystudies.us/mongolia/>>.

disability, old age, loss of breadwinner, mothers of large families and pregnant women.¹⁷⁹ By 1980, Mongolia's expansive social welfare system consumed about three-quarters of the state budget.¹⁸⁰ People had guaranteed employment; in fact, unemployment was considered illegal.¹⁸¹

By the mid-1980s, the shortcomings of the tightly controlled regime became obvious and criticisms against the regime intensified.¹⁸² The rise of Mikhail Gorbachev in Soviet politics and his promotion of 'glasnost' (openness and greater freedom of expression) and 'perestroika' (restructuring of economy) greatly influenced Mongolia. In the late 1980s, the Union of Soviet Socialist Republic (USSR) was plagued by own domestic problems, diminishing its influence on Mongolia substantially.¹⁸³ In this context came a historic International Human Rights Day. On 10 December 1989, around 200 young people in their twenties and thirties gathered together at the Sukhbaatar square — the most important public space in Mongolia which is located in front of the State Palace — and called for political freedom.¹⁸⁴ The demonstration went peacefully and the crowd dispersed voluntarily. However, the event sparked a series of protests across the country, which continued until 10 May 1990, when the MPRP *Politburo* stepped down and agreed to hold a multiparty election.¹⁸⁵ In July 1990, the first multiparty election was held, leading to the formation of a democratic government in that year.

On 13 January 1992, the *Constitution of Mongolia 1992* (the *Mongolian Constitution* or the *Constitution*) was adopted.¹⁸⁶ It is the fourth constitution of the country,¹⁸⁷ but the

¹⁷⁹ Butler, above n 182, 462.

¹⁸⁰ International Monetary Fund, *IMF Staff Country Report No 95/11* (1995) 7.

¹⁸¹ Richard J. Smith, 'Ending Poverty in Mongolia: From Socialism to Social Development' (2015) 24(2) *International Journal of Social Welfare* 159, 163.

¹⁸² See Alan J.K. Sanders, 'Mongolia in 1984: From Tsedenbal to Batmönkh' (1985) 25(1) *Asian Survey* 122. In 1984, former university chancellor Jamba Batmönkh came to power, ending four decades of leadership by Tsedenbal Yumjaa. Batmönkh's 1985-1989 attempt to restructure the economy and promote political openness went unsuccessfully. Some party leaders started calling for the Mongolian nationalism, including rewriting of Mongolian history and embracing *Chinggis Haan*, and the right not to implement orders given by the Soviet Politburo.

¹⁸³ Tsendendamba and Soni, above n 164, 106.

¹⁸⁴ See Morris Rossabi, *Modern Mongolia: From Khans to Commissars to Capitalists* (University of California Press, 2005) 1.

¹⁸⁵ Ibid 1-29. In May 1990, the *Constitution* was amended to provide for the establishment of parliament, multiparty elections and a drafting of a new constitution. Security forces and the army were not involved in the 1990 demonstrations. Mongolia transitioned to democracy peacefully.

¹⁸⁶ Монгол Улсын Үндсэн Хууль [Constitution of Mongolia] (Mongolia) adopted on 13 January 1992 (*Mongolian Constitution*). The *Constitution* was drafted between 1990 and 1992 by a twenty-member multiparty Constitution Drafting Commission. The *Constitution* was debated by the Baga Hural four

first democratic constitution, declaring the supreme objective of Mongolians as to ‘build a humane, civil and democratic society in our motherland.’¹⁸⁸ Mongolia then entered a phase of a dramatic dual transition, from socialism to democracy and from a centrally planned economy to a free market economy. As the next section will discuss, Mongolia is making efforts to grow liberal democratic values in its own soil. Nonetheless, legacies of the 20th century, when the country evolved through three different political regimes, inform the ways that Mongolians appreciate and interpret democratic ideals to a large extent.¹⁸⁹

B Governance

The *Mongolian Constitution* establishes a President, a unicameral Parliament and an executive government as the key political institutions. A directly elected President is the head of state.¹⁹⁰ In consideration of the Mongolian tradition of being governed by strong, centralised leaders, the *Constitution* drafters chose to have a President as a symbolic head of state,¹⁹¹ but prescribed weak presidential powers, because of a fear that concentrating too much power in an individual may lead to the revival of socialism.¹⁹² Parliament is ‘the highest organ of the state power,’ and, according to the *Constitution*, ‘the supreme legislative power shall be vested only in a Parliament.’¹⁹³ The Parliament has 76 members and is formed by a periodic election that is held in

times, discussed publicly for three months, and debated at the end of 1991 by the People’s Great Hural for 70 days and promulgated on 13 January 1992. A first draft was produced in a little over eight months and the entire process from the formation of the drafting commission to the adoption took 15 months. The process was open to public and the constitutional transition was accomplished quickly and smoothly. See Alan J.K. Sanders, ‘Mongolia’s New Constitution: Blueprint for Democracy’ (1992) 32(6) *Asian Survey* 506.

¹⁸⁷ After the 1924 *Constitution*, Mongolia adopted two other *Constitutions* in 1940 and 1960 respectively.

¹⁸⁸ *Mongolian Constitution* art 2.

¹⁸⁹ See especially Sabloff, above n 166, 191-205. Mongolians have a deep-rooted sense of respect and obedience to the state. Although it should not be exaggerated, Mongolians say ‘may the state spirit bless you.’

¹⁹⁰ *Mongolian Constitution* arts 30(1), 31.

¹⁹¹ Batbayar Tsedendamba, ‘Foreign Policy and Domestic Reform in Mongolia’ (2003) 22(1) *Central Asian Survey* 45, 46.

¹⁹² *Mongolian Constitution* art 25. The President exercises a power to wholly or partially veto any legislation; a two-thirds majority of the Parliament is needed to override the veto. The President nominates the Prime Minister, in consultation with the majority party or group of parties.

¹⁹³ *Ibid* art 20.

four-year cycles.¹⁹⁴ The executive government is headed by a Prime Minister and is held accountable to the Parliament.¹⁹⁵

The Mongolian governmental system is generally identified as a parliamentary system, but scholars differ in their understanding. In fact, the precise balancing of power between political institutions had varied over time in both law and practice, due to the ambiguity of the *Constitution* with regard to the appointment of a Prime Minister and of the composition of the Cabinet.¹⁹⁶ The initial design of the constitutional power balance was more of a semi-presidential model, where the President exercised a greater power in the forming of the executive government. However, as a result of gridlock in forming a government in the aftermath of the 1996 election, the *Constitution* was amended in 2000 and curbed presidential powers in relation to the appointment of a Prime Minister.¹⁹⁷ Consequently, the Parliament became the de jure strongest institution in Mongolian politics.¹⁹⁸

Nevertheless, political practice is much more complicated. Given that the current Cabinet has 19 members, the majority of whom are simultaneously serving in the Parliament, and the Parliament has 76 members, the Cabinet could contain a half of the members of the ruling party in the Parliament. Furthermore, the lowered quorum rule introduced by the *2000 Constitutional Amendments* allows as few as twenty MPs to pass

¹⁹⁴ Ibid arts 21(1), 21(2).

¹⁹⁵ Ibid arts 38, 39.

¹⁹⁶ Ibid art 39(2). Under article 33(2) of the *Mongolian Constitution*, a President may, in consultation with the majority party or coalition, propose a candidate for a Prime Minister. A Prime Minister is expected to secure a President's approval not only over the composition and structure of the Cabinet, but also for the selection of Cabinet ministers - before submitting the matter to parliamentary deliberation. It is unclear from the text what would happen in the event of a disagreement between the Parliament and President on the candidacy for Prime Minister. It is also unclear what would happen if there is disagreement between the Prime Minister and President on the composition of the Cabinet. Article 25(6) of the *Constitution* gives Parliament a power to appoint, replace or remove the Prime Minister and form the Cabinet.

¹⁹⁷ As a result, a President's negotiating power regarding nomination of a Prime Minister was removed from article 33(2) of the *Constitution*. Instead, the amendments turned a former power into a duty, forcing a President to propose to Parliament a Prime Ministerial candidate nominated by the majority party within five working days. Furthermore, amendments to article 39(2) granted a Prime Minister the authority to submit proposals on changing the structure and composition of the Cabinet to the Parliament, freeing the Premier from presidential interference.

¹⁹⁸ See Munkh-Erdene Lhamsuren, 'The Transformation of Mongolia's Political System: From Semi-parliamentary to Parliamentary?' (2010) 50(2) *Asian Survey* 311. One of the ambiguities involving the composition of the Cabinet is the question of whether a Member of Parliament (MP) could serve simultaneously as a Cabinet member. In 1996, the Constitutional *Tsets* discussed this matter and held that that a MP could not hold a cabinet post as it would violate the separation of power and distort parliamentary oversight over the conduct of executive government. The case resulted in a long struggle among the political institutions and was resolved by Parliament's victory.

a law.¹⁹⁹ These conditions enable the Cabinet to pass laws with the support of only three other MPs. As such, the Prime Minister can be the most powerful political figure in Mongolia effectively controlling Parliament. Yet again, unlike his/her Australian counterpart, a Mongolian Prime Minister is not required to be the leader of his/her party and, on some occasions, it causes the Prime Minister to be in a political limbo between the government and the ruling party. In a nutshell, Mongolian politics is fluid and highly unpredictable and the fundamental rules of political institutions are still being drawn.

The *Mongolian Constitution* establishes a system of an independent judiciary, headed by the Supreme Court,²⁰⁰ and the Constitutional Court (the Constitutional *Tsets*) functioning separately from the judiciary.²⁰¹ The Constitutional *Tsets* is mandated to review the constitutionality of laws such as international treaties, laws, decisions of Parliament, President and government as well as the conduct of high-level political officials. The system of the Mongolian judiciary consists of the Supreme Court, appellate courts and first instance courts, which are specialised in civil, criminal and administrative matters. The role of the Mongolian judiciary in protecting human rights will be discussed below.

Mongolia is a relatively homogenous nation of 3 million people. As regards its administrative structure, Mongolia is a unitary state consisting of 21 *aimags* (provinces) and the capital city. *Aimags* are divided into 315 *soums* and the capital city is divided into nine districts. Despite efforts to decentralise the power of the central government, it is the key authority, making decisions over almost all areas of social, economic and political matters.

Since the transition, Mongolia is making significant efforts in consolidating democratic governance, sustaining the rule of law and protecting human rights and freedoms. First of all, in order to implement the transformation of the economic and political system,

¹⁹⁹ The 2000 Constitutional amendments made changes to the quorum and voting rule in the Parliament. Amendments to article 26(7) of the *Constitution* reduced the quorum from 51 to 39 MPs. This was designed to prevent the opposition from freezing parliament by denying a quorum, but the result was that as few as twenty MPs (less than one third of total members) can effectively pass any legislation except a constitutional amendment.

²⁰⁰ *Mongolian Constitution* arts 47-56.

²⁰¹ *Ibid* ch 5.

Mongolia had to re-write all its laws.²⁰² An extensive legal reform was undertaken completing the critical phases in 1992-96 and 1994-96.²⁰³ While the roles and functions of traditional institutions were transformed, new institutions protecting the rule of law and democratic values were established. It can be said that the Mongolian judiciary under socialism functioned merely as a rubber stamp of the MPRP and Politburo.²⁰⁴ Under the new regime, it has to function as the primary guardian of the rule of law.²⁰⁵ In 2004, a system of administrative courts was established to review the legality of decisions and delegated legislation adopted by broad ranging public authorities.²⁰⁶ Independent oversight agencies, the National Human Rights Commission of Mongolia (NHRCM)²⁰⁷ and the Independent Authority against Corruption²⁰⁸ were established in 2001 and 2007 respectively. Civil society institutions grew in number too. As of October 2016, Mongolia had 23 028 NGOs, 1 119 foundations, 2 676 trade unions, 746 religious organisations and 3 561 mass media organisations.²⁰⁹

²⁰² Amarsanaa Jugnee, 'Mongolian Legal System: Current Situation and Future Direction' in Amarsanaa Jugnee (ed), *Democratic Rule of Law (Ардчилсан эрх зүйн ёс)* (National Legal Institute Press, 2009) 22. The first session of the Parliament formally abolished the directives, ordinances and decisions of the socialist government, which constituted the Mongolians laws. Between 1992 and 1996 during the office term of the first democratic Parliament, 137 new pieces of legislation were adopted, 142 pieces of legislation were amended and 46 pieces of legislation were invalidated. The following Parliament (1996-2000) adopted 110 pieces of legislation, amended 255 pieces of legislation and invalidated 46 pieces of legislation.

²⁰³ See Sebastian R. Astrada, 'Exporting the Rule of Law to Mongolia: Post-socialist Legal and Judicial Reforms' (2009) 38(3) *Denver Journal of International Law and Policy* 461.

²⁰⁴ Jugnee, above n 207, 23.

²⁰⁵ Judicial reform started since the early 1990s. However, due to the economic crisis, the reform became stagnant until 2010. Judicial reform became a top priority again in recent years under the leadership of President Elbegdorj Tsahia. A new set of laws on the judiciary entered into force in 15 April 2013. These laws include Монгол Улсын Шүүхийн тухай [Law on Judiciary of Mongolia] (Mongolia) adopted on 7 March 2012; Шүүгчийн эрх зүйн байдлын тухай [Law on the Legal Status of Judges] (Mongolia) adopted on 7 March 2012; Шүүхийн захиргааны тухай [Law on the Court Administration] (Mongolia) adopted on 22 May 2012; Шүүхийн иргэдийн төлөөлөгчийн эрх зүйн байдлын тухай [Law on a Representative Citizen in Court Proceedings] (Mongolia) adopted on 22 May 2012; Хуульчийн эрх зүйн байдлын тухай [Law on Legal Status of a Lawyer] (Mongolia) adopted on 7 March 2012; Эвлэрүүлэн зуучлалын тухай [Law on Alternative Dispute Resolution] (Mongolia) adopted on 22 May 2012.

²⁰⁶ Захиргааны ерөнхий хууль [General Law on Administration] (Mongolia) adopted on 19 June 2015; Захиргааны хэрэг шүүхэд хянан шийдвэрлэх тухай [Law on Administrative Proceedings] (Mongolia) adopted on 4 February 2016. The administrative courts review the legality of decisions of most public authorities, including the Cabinet and its members, ministries, government agencies, provincial governors, administration of public and private schools, hospitals and the administration of religious organisations.

²⁰⁷ Монгол Улсын Хүний Эрхийн Үндэсний Комиссын тухай [Law on the National Human Rights Commission of Mongolia] (Mongolia) adopted on 7 December 2000 (*Law on the NHRCM*).

²⁰⁸ Авилгын эсрэг хууль [Anti-corruption law] (Mongolia) adopted on 6 July 2006.

²⁰⁹ General Authority of Intellectual Property and State Registration, *Statistics of October 2016* (18 November 2016) < <http://www.burtgel.mn/index.php/news/statistical-rating-item/1464-2016-10>>.

Notwithstanding substantive legal and institutional developments, Mongolian public and civil society institutions are generally unsettled and flawed.²¹⁰ It can be said that Mongolia does not have partisan politics. There are a number of political parties, including three parliamentary parties in Mongolia.²¹¹ But the MPP and the Democratic Party (DP) are the main political forces forming the government in turn. The MPP claims to be a left-centric party, whereas the DP is a right-centric party. However, the philosophy pursued by the two parties does not seem to differ in most policy areas. Moreover, there is an odd practice in the Mongolian politics that a winning party voluntarily gives up its right to form a single party government and invites the Opposition to form a coalition government.²¹² The strategy, which compromises the democratic choices of Mongolian people, is justified by the necessity to secure consensus between the two parties and the urge to move major development projects forward.

As a small country with finite resources, Mongolia has a relatively compact public administration. In some occasions, public officials are overloaded performing multiple duties. Most civil society actors that I interviewed identified that lack of expertise and high level of staff turnover are the main obstacles for them to effectively work with public agencies. Despite the impressive figures shown above, the number of functional NGOs is far lower,²¹³ and NGOs are highly dependent on foreign donors.²¹⁴ While their

²¹⁰ See, eg, Bruce M. Knauft and Richard Taupier (eds), *Mongolians after Socialism: Politics, Economy and Religion* (Admon Press, 2012); Julian B. Dierkes (ed), *Change in Democratic Mongolia: Social Relations, Health, Mobile Pastoralism and Mining* (Brill, 2012).

²¹¹ The Supreme Court registers political parties. As of January 2017, Mongolia had 24 registered political parties and three of them have seats in the current parliament including MPP, Democratic Party and Mongolian People's Revolutionary Party (established in 2010). MPP is the oldest political party of Mongolia, which was founded in 1920. The party adopted the name Mongolian People's Revolutionary Party (MPRP) in 1924. In 2010, the Party reverted to its original name by dropping the word 'revolutionary.' The name change caused a breakaway faction, which retained the longstanding name, MPRP. The MPP and the MPRP should not be confused. In 2010, Enkhbayar Nambar, a former chair of the MPP (MPRP until 2010) and a former President of Mongolia, established the renowned MPRP.

²¹² Since the first democratic election held in 1990, the MPP won with an overwhelming majority of the vote, but it formed a coalition government with the opposition offering four cabinet posts. In 1992, the MPP also won with a great majority in the election that was organised under the new constitution and invited the Opposition again in the parliament. The 2008 election was marred by violence and a state of emergency was declared. The MPP won again in 2008 election, but formed a coalition government offering 40 per cent of the cabinet posts including the position of first deputy premier to the Democratic Party.

²¹³ As of November 2015, 20 862 NGOs have been registered and it is generally estimated that 20 per cent of the registered NGOs are active. See Open Society Forum, *NGOs in Mongolia: Survey Report* (2005) <http://www.forum.mn/res_mat/NGOS_Survey20060314_en.pdf>; Centre for Citizens Alliance, *State of civil society in Mongolia 2004-2005: CIVICUS Civil Society Index for Mongolia* (2005) 8.

external working environment is challenging,²¹⁵ accountability and internal democracy among the NGOs are nascent.²¹⁶ However, it should be noted that Mongolian NGOs have been the drivers of major legal and institutional reforms.²¹⁷ Moreover, evidence suggests that, even in a least expected circumstance, NGOs are able to bring effective pressure on government and achieve major outcomes.²¹⁸

C Human rights protection in Mongolia

1 Sources of law

The Mongolian legal system is classified as belonging to Roman-Germanic legal family, where extensive codified laws regulate social relationships.²¹⁹ Customs and commonly practised behaviour can be a source of law, if legislation adopted by Parliament provides so.²²⁰ Legal doctrine is not considered as a source of law,²²¹ and the judiciary is assumed to having no law-making power. Supreme Court decisions are binding on all courts and legal persons for the purpose of a particular case, but they do not have further effects on the legal system. However, the Supreme Court has a power to issue an authoritative interpretation of legal provisions in the absence of a case, and such abstract interpretation is deemed to be binding on the legal system.²²²

²¹⁴ See Byambajav Dalaibuyan, 'International NGOs in Mongolia: A Crucial Factor in Mongolian Society and Politics' (2006) 13 *Mongolian Journal of International Affairs* 132.

²¹⁵ See World Bank 'The Enabling Environment for Social Accountability in Mongolia' (Washington DC, 2007); Undarya Tumursukh, 'State of Civil Society Development in Mongolia' (2013) 18 *Mongolian Journal of International Affairs* 52, 57-65.

²¹⁶ Interview with Altantuya Batdorj, Executive Director, Amnesty International Mongolia (Ulaanbaatar, 02 June 2013). See also, Jargalsaikhan Mendee 'Civil Society in Non-Western Settings: Mongolian Civil Society' (Thesis submitted in Partial Fulfilment of the Requirement for the Degree of Master of Arts, The University of British Columbia, 2012) 25.

²¹⁷ NGOs played pivotal roles in establishing the NHRCM and adopting laws concerning domestic violence, gender equality, the right to information and corruption.

²¹⁸ See, eg, Byambajav Dalaibuyan, 'The River Movements' Struggle in Mongolia' (2015) 14(1) *Social Movement Studies* 92.

²¹⁹ The *Constitution* is the supreme law of Mongolia. The Parliament adopts legislation, which is considered as fundamental legal source. All ministries and state agencies have the power to issue normative acts pursuant to delegated legislative authority from the Parliament. The acts of ministries and other government offices are called instructions, instructive regulations and orders. Only normative acts issued by the Parliament, the President, the Government and ministries apply nationwide.

²²⁰ Иргэний хууль [Civil Code] (Mongolia) adopted on 10 January 2002 art 4(2). It provides that 'in case of a lack of rules of law regulating similar relations, such relations shall be regulated in conformity with the content and principles of civil law and requirements of commonly recognised rules of behaviour' (my translation).

²²¹ Narangerel Sodovsuren, *Mongolian and the World Legal Systems* (Монголын ба дэлхийн эрх зүйн тогтолцоо) (Munkhiin useg, 2001) 121.

²²² The *Constitution* gives the Supreme Court a power to 'provide official interpretations for correct application of all other laws except for the *Constitution*.' The Supreme Court exercises this power by

The *Constitution* establishes the Mongolian approach to international law as: ‘[it] shall adhere to the universally recognised norms and principles of international law and pursue a peaceful foreign policy’²²³ and ‘[it] shall fulfil in good faith its obligations under international treaties to which it is a party.’²²⁴ In determining the application of international law in the legal system, Mongolia follows the monist tradition. Thus, according to the *Constitution*, an international treaty becomes a part of domestic law, once the law approving ratification has entered into force.²²⁵ However, international treaty norms are void, if they found to be incompatible with the *Constitution*.²²⁶ As a general rule, international treaty norms prevail over the contrary provisions of domestic law.²²⁷ The only exception is the *Criminal Law (2002)*, which exclusively establishes the crimes and sanctions in the Mongolian jurisdiction.²²⁸

2 Legal protection of human rights

Mongolia has an extensive legal protection of human rights. The *Constitution* contains a comprehensive guarantee of civil, political, economic, social and cultural rights in a similar fashion as the *UDHR*,²²⁹ and provides that ‘the state shall be responsible to citizens for the creation of economic, social, legal and other guarantees for realising human rights and freedoms, to combat against violation of human rights and freedoms and to restore the infringed rights.’²³⁰ At the same time, the *Constitution* also provides

enacting a resolution on authoritative interpretation of laws at request by individuals and organisations as well as on its initiative. The *Law on Courts of Mongolia* adopted in 2012 restricted such power of the Supreme Court by requiring the presence of actual cases. But, in 2015, the Constitutional Tsets has held that the provision of the *Law on Judiciary* was unconstitutional and restored the Supreme Court’s power to issue an abstract interpretation of laws. Practically, however, the Supreme Court has not issued such interpretation of laws since 2010 until March 2018. See *Mongolian Constitution* art 50(1)(4), Монгол Улсын Шүүхийн тухай [Law on Courts of Mongolia] art 17(3)(1). See also, Монгол Улсын Үндсэн Хуулийн Цэцийн 2015 оны 3 дугаар сарын 11-ны өдрийн 03 дугаар дүгнэлт [Determination No 03 of the Constitutional Tsets of Mongolia of 11 March 2013: Regarding the review of article 17(3)(1) of the Law on Courts of Mongolia], Монгол Улсын Үндсэн Хуулийн Цэцийн 2015 оны 10 дугаар сарын 30-ны өдрийн 07 дугаар тогтоол [Resolution No 07 of the Constitutional Tsets of Mongolia of 20 October 2015: Regarding the final review of article 17(3)(1) of the Law on Courts of Mongolia].

²²³ Ibid art 10(1).

²²⁴ Ibid art 10(2).

²²⁵ Ibid art 10(3).

²²⁶ Ibid art 10(4).

²²⁷ About 150 pieces of legislation adopted by the Parliament affirm the supremacy of international treaties over their provisions in case of contradiction.

²²⁸ Эрүүгийн хууль [Criminal Code] (Mongolia) adopted on 03 January 2002 arts 3(1), 3(2).

²²⁹ *Mongolian Constitution* ch II.

²³⁰ Ibid art 25.

for the fundamental and sacred duties of Mongolian citizens.²³¹ The constitutional rights and duties are applicable to Mongolian citizens.²³² Stateless persons exercise their constitutional rights and freedoms in accordance with Mongolian laws.²³³ Rights and freedoms of foreign nationals are determined by bilateral agreements concluded with their state of origin and Mongolia.²³⁴

In addition to the constitutional bill of rights, Mongolia has ratified a number of international treaties relating to human rights. It is a party to nine out of ten core human rights treaties, except the *CMW*,²³⁵ and most of the optional protocols to these treaties.²³⁶ Mongolia has ratified 20 ILO conventions, including all eight fundamental conventions.²³⁷ Other treaties relating to human rights, to which Mongolia is a party, include the *Rome Statute*, the *Genocide Convention*, the *UNESCO Discrimination Convention*, the *International Convention against Apartheid in Sport*²³⁸ and the *Convention on the Political Rights of Women*.²³⁹ Mongolia has not made any reservation or interpretative declaration to these treaties.

Furthermore, Mongolia has adopted dozens of laws providing procedures for exercising or enforcing the protected rights and freedoms. These laws encompass the negative and

²³¹ Ibid art 17. The inclusion of fundamental and sacred duties is probably the reminiscent of the previous Constitutions. The *1960 Constitution*, for example, contained designated chapters on the rights and freedoms (Chapter 7) and responsibilities (Chapter 8) of citizens. See also Butler, above n 182, 174-95.

²³² *Mongolian Constitution* art 14(2). The *Constitution* prohibits the discrimination against people on various grounds including ethnic origin, language, race, age, sex, social origin and status, property, occupation and professional position, religion, opinion or education.

²³³ Ibid art 18(3).

²³⁴ Ibid arts 18(1), 18(2).

²³⁵ Mongolia is a party to the following core human rights treaties: *ICERD*, *ICESCR*, *ICCPR*, *CEDAW*, *CAT*, *CRC*, *Disabilities Convention* and *ICPED*.

²³⁶ Mongolian accepted following Optional Protocols to the core human rights treaties: *ICCPR-OP*, *ICCPR-OPII*, *OP-CEDAW*, *OP-CAT*, *Optional Protocol to the Disabilities Convention*, *CRC-OP-AC*, *CRS-OP-SC*, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, opened for signature 24 September 2009 (entered into force 5 May 2013), *Optional Protocol to the Convention of the Rights of the Child on a communication procedure*, opened for signature 19 December 2011 (entered into force 14 April 2014).

²³⁷ See International Labour Organization, *NORMLEX Information System on International Labour Standards: Ratification for Mongolia* (January 2017)

<http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103142>.

Mongolia is party to the ILO's eight fundamental conventions, including the *ILO Convention 29*, *ILO Convention 87*, *ILO Convention 98*, *ILO Convention 100*, *ILO Convention 105*, *ILO Convention 111*, *ILO Convention 182*, *Minimum Age Convention*, opened for signature 26 June 1973, *ILO Convention No 138* (entered into force 19 July 1976).

²³⁸ *International Convention against Apartheid in Sport*, opened for signature 20 December 1985, 1500 UNTS 161 (entered into force 3 April 1988).

²³⁹ *Convention on the Political Rights of Women*, opened for signature 31 March 1953, 193 UNTS 135 (entered into force 7 July 1954).

positive duties of the government in enabling rights implementation. Such laws include the *Law on Procedures of the Conduct of Demonstration and Assembly 1994*,²⁴⁰ the *Law on Privacy of an Individual 1995*,²⁴¹ the *Law on Criminal Procedure 2002*,²⁴² the *Law on Combating Domestic Violence 2004*,²⁴³ the *Labour Law 1999*,²⁴⁴ the *Law on Social Welfare 2012*.²⁴⁵ Moreover, Mongolia has adopted laws protecting the rights and entitlement of certain groups of people, including the *Law on the Rights of a Child 2016*,²⁴⁶ the *Law on Child Protection 2016*,²⁴⁷ the *Law on the Rights of a Person with Disability 2016*,²⁴⁸ the *Law on Gender Equality 2013*²⁴⁹ and the *Law on Social Protection of Elderly 2006*.²⁵⁰ While protecting human rights, these laws generally provide various forms of social services and assistances to the targeted population. The *Law on Gender Equality 2013* is an exception among these laws, adopting an anti-discrimination approach in similar way to the *Sex Discrimination Act 1984* (Cth) of Australia.

3 Enforcement of human rights laws

While Mongolian legal protection of human rights is impressive, the enforcement of these laws is deeply problematic. Human rights instruments are rarely invoked in courts. Despite the promising possibility of directly invoking human rights treaties in court cases, for example, as of November 2016, only one case has been decided with substantive application of article 14(1) of the *CAT*.²⁵¹ A lack of culture to enforce

²⁴⁰ Жагсаал, цуглаан хийх журмын тухай [Law on Procedures of Conducting Demonstration and Assembly] (Mongolia) adopted on 7 July 1994.

²⁴¹ Хувь хүний нууцийн тухай [Law on Privacy of an Individual] (Mongolia) adopted on 21 April 1995.

²⁴² Эрүүгийн байцаан шийтгэх хууль [Law on Criminal Procedure] (Mongolia) adopted on 10 January 2002.

²⁴³ Гэр бүлийн хүчирхийлэлтэй тэмцэх тухай [Law on Combating against Domestic Violence] (Mongolia) adopted on 13 May 2004.

²⁴⁴ Хөдөлмөрийн тухай [Labour Law] (Mongolia) adopted on 14 May 1999.

²⁴⁵ Нийгмийн халамжийн тухай [Law on Social Welfare] (Mongolia) adopted on 19 January 2012.

²⁴⁶ Хүүхдийн эрхийн тухай [Law on the Rights of a Child] (Mongolia) adopted on 5 February 2016.

²⁴⁷ Хүүхэд хамгааллын тухай [Law on Child Protection] (Mongolia) adopted on 5 February 2016.

²⁴⁸ Хөгжлийн бэрхшээлтэй хүний эрхийн тухай [Law on the Rights of a Person with Disability] (Mongolia) adopted on 5 February 2016.

²⁴⁹ Жендэрийн эрх тэгш байдлыг хангах тухай [Law on Gender Equality] (Mongolia) adopted on 2 February 2011.

²⁵⁰ Ахмад настны нийгмийн хамгааллын тухай (шинэчилсэн найруулга) [Law on Social Protection of Elderly (revision)] (Mongolia) adopted on 8 December 2005.

²⁵¹ In 2005, on behalf of six victims, the NHRCM sued the government for compensation for illegal arrest, detention and torture. After being detained for three years as suspects of a murder, these people were released by a decision of the Supreme Court as their involvement in the crime was not proved. While being detained, they were severely tortured by the detention guards and one of them died. An

human rights laws, which many Mongolian scholars identify as a reminiscent of socialism where human rights remained as mere declaratory, is commonly seen as the main reason.²⁵² However, there are several procedural gaps, hindering the effective enforcement of human rights instruments. A major problem is rooted in, as Tom Ginsburg describes, ‘a hermetic separation’ between the *Mongolian Constitution* and ordinary laws.²⁵³ The Constitutional *Tsets* does not deal with factual violations of constitutional rights.²⁵⁴ At the same time, other courts do not consider constitutional matters. The Supreme Court has held that constitutional rights can only receive protection from the courts if the rights are incorporated into ordinary laws and sanctions are prescribed for breaches. Some constitutional rights are not fully elaborated by ordinary legislation, leaving those rights outside of the scope of judicial remedies from the ordinary courts.

The NHRCM receives individual complaints alleging the breach of human rights and freedoms guaranteed by the *Constitution*, international treaties and legislation.²⁵⁵ Yet such seemingly broad jurisdiction of the Commission is restricted by an ambiguous provision in its founding legislation, providing that ‘the Commission shall not receive complaints related to civil, criminal and administrative matters, which have been already dealt by the courts.’²⁵⁶ This provision is subject to multiple interpretations.²⁵⁷ For instance, it has been interpreted restrictively to prohibit the Commission from receiving any complaint falling under the jurisdiction of courts. The provision also has been interpreted in a less restrictive way, so that the Commission is prohibited only

applicable Mongolian law does not provide for a monetary compensation for death. On the basis of article 14(1) of the *CAT*, the Commission claimed the monetary compensation for the death and won.

²⁵² See, eg, Tserendorj Suren, ‘International Treaties on Human Rights and Mongolian Legal Reform’ (2004) 29 *International Legal Practice* 129, 129.

²⁵³ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003) 180.

²⁵⁴ *Mongolian Constitution* art 66. Under this provision, the jurisdiction of the Constitutional *Tsets* covers laws, decrees and decisions of Parliament, government decisions and international treaties, but not Supreme Court cases. Article 50(2) of the *Constitution* further states that Supreme Court decisions are final.

²⁵⁵ *Law on the NHRCM* art 9.

²⁵⁶ *Ibid* art 11(2).

²⁵⁷ Narantuya Ganbat, ‘Inhibited Action: Rethinking Quasi-Judicial Competence of the National Human Rights Commission of Mongolia’ (Paper presented at the National Human Rights Institutions Workshop, NHRIs (In)Action in the Asia-Pacific Region, Melbourne Law School, 22 July 2009)

<<http://intranet.law.unimelb.edu.au/staff/events/files/NHRI%20Abstracts%20and%20Bios.pdf>>. Based on my experience as a complaints officer of the NHRCM, this paper discusses the ambivalent nature of the above discussed provision of the founding legislation of the NHRCM and its practical implications.

from receiving a complaint, the subject of which is being dealt by courts. Due to imprecise jurisdictional delineation between courts and the Commission, the latter acts as a messenger for some type of complaints, transferring them to the courts or relevant authorities, who deal with the related cases.²⁵⁸

In addition, three specific problems diminish the judicial application of human rights treaties. First, Mongolian laws provide limited guidance on the issue. The *Law on Court 2012*,²⁵⁹ the only legislation dealing with the matter, stipulates two broad rules, providing that ‘only international treaties of Mongolia that are in force and are officially published shall be applied by a court,’²⁶⁰ and ‘if a provision of a legislation or an international treaty that is applicable to a case before a court contradicts with the *Constitution*, the court shall suspend the proceeding and submit a proposal on proper application of the provision to the Supreme Court.’²⁶¹ To assist the application of international law in court cases, the Supreme Court issued a directive in 2008.²⁶² However, the directive, which is framed broadly, does not seem to provide precise guidance. The main recommendation of the directive concerning judicial application of international treaties states that:

An international treaty provision, which does not contradict the *Constitution* and is officially published, shall be directly applicable within the territory of Mongolia (self-executing nature), unless a treaty specifically provides that domestic laws should be amended in relation to implement the treaty provision.²⁶³

Yet, all human rights treaties establish general obligations for a state party to bring its domestic laws in line with treaty norms. Furthermore, some treaties such as *CAT* require specific legislative action to recognise the legality or illegality of a certain act in

²⁵⁸ Ibid 4.

²⁵⁹ Монгол Улсын Шүүхийн тухай [Law on the Court of Mongolia] (Mongolia) adopted on 7 March 2012.

²⁶⁰ Ibid art 7(3).

²⁶¹ Ibid art 7(4).

²⁶² *Judicial application of international treaties of Mongolia and customary international laws and principles*, Supreme Court of Mongolia, Resolution No 9 (adopted on 28 February 2008).

²⁶³ Ibid para 3. The main paragraph reads:

An international treaty, which has entered into force and has officially published, that does not require amendments to domestic laws, that does not contradict with the Constitution and that directly constitutes rights and obligations to parties of domestic legal relationships may be applied in civil, criminal and administrative cases (my translation).

domestic legal orders.²⁶⁴ The Supreme Court guidance does not distinguish between these general and specific obligations concerning legislative actions and, therefore, is ambiguous for human rights treaties.

Second, poor translation of international treaties hinders effective implementation and enforcement. The Ministry of Foreign Affairs issues the official translations of international treaties. According to its senior officials, the Ministry has limited human resources to translate international treaties and therefore, often relies on and verifies the unofficial translation of the treaties that is undertaken by NGOs or interest-groups.²⁶⁵ Some concepts and terms of human rights treaties would not be easily translated into Mongolian language. For example, the concept of ‘human dignity’ is translated and used by Mongolian scholars in various ways, including ‘human worth’ (*une tsene*), ‘honour’ (*aldar hund*), ‘an esteemed status’ (*erhem zereg*) or ‘esteemed existence’ (*erhemseg orshihui*). The legal provisions concerning the translation of international treaties are general and do not provide effective guidance.²⁶⁶ The complex philosophies and concepts of human rights treaties are generally poorly translated into the Mongolian language and are not often read as enforceable legal instruments.

Third, the publication of international treaties in the State Gazette is often delayed for years, effectively restraining the treaties’ capacity to enter into force. As mentioned, a ratified treaty enters into force for Mongolia, ten days after the publication of its full text in the State Gazette.²⁶⁷ For example, the two *Covenants*, which Mongolia ratified in 1984, were not published in the State Gazette until the NHRCM initiated a joint project

²⁶⁴ See *CAT* art 4.

²⁶⁵ Confidential Interview No 3 (Ulaanbaatar, 14 June 2013) [The interviewee holds a senior position at the Ministry of Foreign Affairs, supervising ratification and implementation of multilateral international treaties of Mongolia].

²⁶⁶ Төрийн албан ёсны хэлний тухай [Law on the Official Language of the State] (Mongolia) adopted on 15 May 2003 art 6(6). The only provision in the regarding the translation of international law as that ‘international treaties pending ratification shall be translated into official language of the state.’ The *Law on the Official Language of State 2003* established the Council of the State Language, which is mandated to issue an official translation for foreign and adopted terminologies, under the Prime Minister. However, the Council seems to have remained dysfunctional. The *Law on the Mongolian Language 2015* refined the mechanism and brought the matter under the presidential mandate. See Монгол хэлний тухай [Law on the Mongolian Language] (Mongolia) adopted on 12 February 2015.

²⁶⁷ *Mongolian Constitution* art 26(3); Олон улсын гэрээний тухай [Law on International Treaties] (Mongolia) adopted on 28 December 1993 (*Treaties Law 1993*) art 25(1); Монгол Улсын Их Хурлын чуулганы хуралдааны дэгийн тухай [Law on Sessional Procedures of Parliament of Mongolia] adopted on 11 October 2007 (*Law on Sessional Procedures of Parliament 2007*) art 53(10). Under article 7(3) of the *Law on Courts 2012*, only a published international treaty is considered as a source of law and can be applicable in court cases.

with the Ministry of Foreign Affairs in 2002. The *Disabilities Convention*, which was ratified in 2009, was not officially published as of June 2017. According to a ministry official, the main reason for such delay was financial constraints.²⁶⁸

4 *Human rights legal framework and policy-making*

Human rights instruments can inform Mongolian laws and policies. In 1997, Parliament established a designated committee for human rights issues, the Sub-Committee on Human Rights (SCHR), under the Standing Committee on Legal Affairs.²⁶⁹ The SCHR is mandated to discuss any issue relating to human rights and freedoms, including amnesty, asylum and citizenship, and scrutinise the compatibility of legislative acts with the principles of human rights. The effectiveness of the SCHR has not been studied. Relatedly, it should be noted that parliamentary oversight is an emerging practice in Mongolia. Parliament rarely holds public inquiries. Until June 2017, the SCHR had scrutinised only one case with the involvement of public members.²⁷⁰ In fact, the conduct of a public inquiry was not regulated until the adoption of the *Law on Public Hearing 2015*.²⁷¹ Under the new law, Parliament now has a responsibility to consider a request by an individual to hold a public inquiry on draft legal laws restricting human rights and freedoms.²⁷²

The NHRCM advises in law and policy-making and monitors the conformity of legislative acts with human rights.²⁷³ To these ends, the Commission carries out research, examinations and inquiries, and tables annual human rights reports to the Parliament.²⁷⁴ Although the Commission has broad powers in advising law and policy-

²⁶⁸ Confidential Interview No 3 (Ulaanbaatar, 14 June 2013).

²⁶⁹ Монгол Улсын Их Хурлын тухай [Law on the Parliament of Mongolia] (Mongolia) adopted on 26 January 2006 art 24(3)(6).

²⁷⁰ *Human Rights Lecture Series No 1: Featured Khishigdemberel Temuujiin, a former chair of the Sub-Committee on Human Rights* (Organised by National Human Rights Commission of Mongolia and Open Society Forum, 2013) 19:50 <<https://www.youtube.com/watch?v=trsjUEIa-94>>. (In December 2009, the PSCHR has held only one public hearing concerning the riot of 1 July 2008. As of 2013, only 25 per cent of the parliamentary oversight working groups produced written reports and the outcomes were discussed at Parliament.

²⁷¹ Нийтийн сонголын тухай [Law on Public Hearing] (Mongolia) adopted on 8 July 2015 (*Law on Public Hearing 2015*).

²⁷² Ibid art 7(1).

²⁷³ *Law on the NHRCM* art 13. The Commission exercises the powers to put forward a proposal on any human rights issues, to put forward a proposal on conformity of legislation and administrative decision with the principles of human rights and to put forward a proposal on the implementation of human rights treaties and the national reports thereon.

²⁷⁴ *Law on Sessional Procedures of the Parliament 2007* art 47(2)(5); *Law on the NHRCM* art 20.

making, the law does not draw up the procedures of such interventions in detail. The annual reports of the Commission expose the number of cases where Mongolian laws and policies do not comply with human rights and freedoms, and delivers recommendations to the relevant authorities.²⁷⁵ There is some anecdotal evidence showing that the Commission's work has resulted in significant changes in law, practice and social consciousness.²⁷⁶ But Parliament failed to properly discuss and respond to most reports of the Commission.²⁷⁷

The *Law on Legislative Acts 2015* refined the procedures of two scrutiny mechanisms that are relevant to this research: compliance with laws protecting human rights and freedoms and compliance with international treaty provisions.²⁷⁸ In accordance with the *Constitution*, the President, a member of the Parliament and the executive government exercise a power to initiate a law.²⁷⁹ The statute also sets out a requirement for the law-initiating authorities to assess the draft law's implications on human rights, economy, society and environment and its compatibility with the *Constitution* and international treaties prior to introducing it to Parliament.²⁸⁰ Furthermore, a draft law is also examined for its compatibility with the applicable international treaties in two stages of the legislative process, including in assessing the necessity of the law²⁸¹ and in preparing the concept of the law.²⁸² The effectiveness of these procedures is yet to be seen.

D Treaty-making process

In concluding a multilateral international treaty, the Parliament and executive government play a shared role. At the international level, the executive government negotiates and signs multilateral treaties with the consent of and subject to subsequent

²⁷⁵ National Human Rights Commission of Mongolia, *Status reports on Human Rights and Freedoms* (2017) < <http://mn-nhrc.org/eng/main2/188/>>.

²⁷⁶ See, eg, Meg Brodie, 'Uncomfortable Truths: Protecting the Independence of National Human Rights Institutions to Inquire' (2015) 38(3) *UNSW Law Journal* 1215, 1252-55.

²⁷⁷ As of December 2016, the NHRCM has released 14 reports on the situation of human rights and freedoms in Mongolia. Parliament discussed only one report by its plenary session and 10 reports by the Standing Committee on Legal Affairs, and failed to discuss three reports.

²⁷⁸ Хууль тогтоомжийн тухай (шинэчилсэн найруулга) [Law on Legislative Acts (revision)] (Mongolia) adopted on 29 May 2015 (*Law on Legislative Acts 2015*).

²⁷⁹ *Mongolian Constitution* art 26(1).

²⁸⁰ *Law on Legislative Acts 2015* (Mongolia) art 13.

²⁸¹ *Ibid* arts 13(2)(1), 13(2)(5), 13(2)(6).

²⁸² *Ibid* art 14(2)(4).

ratification by Parliament.²⁸³ Nonetheless, according to the *Constitution*, the Parliament exercises a power to ratify and denounce international treaties on the recommendation of the executive government.²⁸⁴ The *Law on International Treaties 1993 (Treaties Law 1993)*²⁸⁵ further stipulates that several types of international treaties, including those concerning fundamental human rights, are subject to the mandatory ratification of Parliament.²⁸⁶ When ratifying an international treaty, Parliament adopts legislation, which often has a single article, affirming the act.

A proposal to ratify an international treaty is first discussed at the government level. Before governmental action, a Ministry that deals with the subject matter of a treaty under consideration drafts the *Concept of the Law on Ratification (the Concept)*. The *Concept*, similar to a NIA in Australia, outlines the reasons for ratifying a treaty as well as the economic, social and legal implications of the proposed treaty action.²⁸⁷ The Ministry of Foreign Affairs and the ministry responsible for the subject matter of the treaty jointly approve the *Concept*.²⁸⁸ The proposal is first discussed by the Cabinet and, if supported, is then introduced to Parliament for a final decision.²⁸⁹

At the Parliament, the Standing Committee on Security and Foreign Policy (SCSFP) first considers and scrutinises the proposal of treaty ratification.²⁹⁰ Any other parliamentary standing committee that deals with treaty matters can discuss the proposed ratification and submit its view to the SCSFP.²⁹¹ The proposal, if upheld by the SCSFP, is referred to a plenary discussion of Parliament.²⁹² A regular majority vote

²⁸³ Ibid art 38(9).

²⁸⁴ *Mongolian Constitution* art 25(15).

²⁸⁵ *Treaties Law 1993*.

²⁸⁶ *Treaties Law 1993* art 10(1) (*Treaties Law 1993*). The *Treaties Law 1993* is a brief legislation consisting of 29 provisions. It covers acts of ratification and acceptance of international treaties, but does not provide detailed guidance on the other stages of treaty making process such as negotiation, implementation or denunciation. Moreover, article 28(11) of the *Law on Sessional Procedures of the Parliament 2007* requires the President, executive government and a Minister of Foreign Affairs to consult with the Parliament before signing an international treaty. The *Law on International Treaties 2016*, a revision of the *Treaties Law 1993*, was adopted on 1 December 2016 and entered into force on 1 January 2017. See Олон улсын гэрээний тухай (шинэчилсэн найруулга) [Law on International Treaties (revision)] adopted on 1 December 2016. The revised version of the law provides more detailed regulations on the subject. This thesis covers the practices under the *Treaties Law 1993*.

²⁸⁷ *Law on Legislative Acts 2015* (Mongolia) art 14.

²⁸⁸ Ibid arts 15(6), 20(9).

²⁸⁹ *Treaties Law 1993* art 10(1).

²⁹⁰ *Law on Sessional Procedures of the Parliament 2007* arts 28, 29.

²⁹¹ Ibid arts 28(3), 28(4), 28(5).

²⁹² Ibid arts 28¹(9), 28¹(11).

of Parliament members make a decision over ratification of an international treaty.²⁹³ Once a treaty is ratified and a law on ratification is adopted, the President endorses the act and signs the instrument of ratification along with a Minister of Foreign Affairs.²⁹⁴ The Ministry of Foreign Affairs delivers the instrument of ratification to a treaty depository.²⁹⁵

IV CONCLUSION

This chapter provides an overview of two country case studies, demonstrating their sharp contrast. Australia and Mongolia are both liberal democracies and are parties to numerous human rights treaties. Apart from these aspects, the two countries are vastly different. Since the birth of the Commonwealth in 1901, Australia has progressed through a relatively stable pathway of development. By contrast, Mongolia has evolved through three different political regimes in the last century. Begun the 20th century as a feudal society that was annexed to Manchu's Qing Dynasty, Mongolia became the second socialist country in the world. In the surge of a global democracy wave in the 1990s, it became the first Asian country to abandon socialism. Mongolian politics and government institutions are in flux, evolving slowly to form a free, fair and open society.

In their respective government structures, Australia is a federal state, consisting of the self-governing States and Territories; Mongolia is a unitary state divided into administrative units. Australia has one of the world's thriving economies. In contrast, Mongolia, which still was not industrialised heavily in the 20th century, but has rich in natural resources and mineral deposits, is trying to recover from a deep recession that followed the dual economic and political transitions.

Australia is a multicultural society of about 24 million people, whereas Mongolia is a relatively homogenous country of three million people, including ethnic minority groups from Turkic origins, which form three per cent of total population. Despite being active ratifiers of human rights treaties, the two countries have largely dissimilar human rights conditions. Australia does not have a comprehensive, national law protecting

²⁹³ Ibid art 28¹(14).

²⁹⁴ *Treaties Law 1993* art 12(3).

²⁹⁵ Ibid art 13.

human rights, but Mongolia has adopted an extensive legal regime in the area. However, in terms of the actualisation of social justice and livelihood of the majority of its population, Australia would outperform Mongolia by any standard.

Australia is a small, but an active player in international politics and has consistently contributed to multilateral treaty-making processes. In comparison, Mongolia is on the periphery of international politics and does not have much engagement in multilateral treaty-making. Australia inherited the English common law, whereas Mongolia adopted the continental legal system. In Australia, a ratified treaty obtains the force of law through an Act of Parliament. Contrastingly, in Mongolia, multilateral treaties become a part of the domestic legal order once ratified. The rich contrasts between the two countries are important in generalising the argument of this research.

CHAPTER SIX

THE *DISABILITIES CONVENTION* IN AUSTRALIA: AN INSTRUMENTALIST STORY

I INTRODUCTION

This Chapter provides an instrumentalist account of Australia's implementation of the *Disabilities Convention*. As defined in Chapter One, the instrumentalist approach focuses on a government response to a human rights treaty and the extent to which treaty norms are incorporated into the domestic legal order. Accordingly, this Chapter discusses the steps that Australian government has taken to implement its obligations, focusing particularly on legal and policy developments that are claimed to have ensured the *Convention*'s implementation in Australia.

In the last decade, Australian disability laws and policies have undergone through an intense change. As this Chapter shows, competent public bodies reviewed many areas of laws in relation to the *Disabilities Convention* such as disability service, infrastructural accessibility, criminal justice, mental health, reproductive rights and aged care. Among these, the chapter focuses on developments around disability service laws and policies. In a nutshell, the Chapter presents a mixed record of Australia's implementation of the *Convention*. Australia made significant developments in some areas of law. At the same time, the Australian governments have resisted complying with *Convention* norms in many other areas of laws and practices.

The Chapter is divided into three main parts. Part II briefly discusses the developments of Australian disability policies in the early 1970s to the 2000s, providing a framework to assess the breadth and depth of the recent disability reforms. In four sections, Part III then delves into the measures that the Australian government has taken to implement its obligations under the *Convention*. Section III (A) discusses the immediate measures that Australian government has taken. It then looks into the application of the *Convention* in complaints addressed to the AHRC and the cases dealt by Australian courts. Finally, it discusses the communications that several Australians have petitioned to the CRPD Committee alleging the government's failure to redress the breaches of their rights.

Section III(B) examines the *National Disability Strategy* and the National Disability Insurance Scheme, the two key examples of recent disability reforms, and the associated developments in particular States. Although the *Disabilities Convention* has implicated many other areas of Australian laws, due to the content limitations of a dissertation, the discussion is focused on disability service legislations. On ratification, the government viewed that Australian disability laws and policies are already in compliance with the *Disabilities Convention*, but the claim must be treated with caution. Section III(C) explains why it is so. Discussing recent inquiries into disability laws that have been undertaken by various authorities, section III(D) demonstrates the limits of Australia's commitment to the *Convention*.

II DEVELOPMENT OF DISABILITY POLICY IN AUSTRALIA

In line with British practices, segregation of people with disabilities occurred from the earliest day of colonial settlement in Australia.¹ Australia's first lunatic asylum, located in Castle Hill, was opened in 1811.² The *Lunacy Act 1843* (NSW) made provision for the criminal and dangerously insane to be confined in jail and public hospitals.³ The Act also allowed for non-dangerous mentally-ill persons to be confined with a request from a relative, two individual medical certificates, and the agreement of a Supreme Court Judge.⁴ Benevolent asylums provided for poor people, who were unable to care for themselves due to disability, whereas those who were considered as 'lunatics' were confined to prisons.⁵ Poor living conditions, abuse and neglect that people with disabilities commonly experienced in such large institutions and asylums are well documented.⁶ As in most Western countries, the eugenic movement became influential in Australia in the 1900s.⁷

¹ Rachel Carling-Jenkins, *Disability and Social Movements: Learning from Australian Experiences* (Ashgate, 2014) 6.

² Ibid 44.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ See, eg, Mike Clear, *Promises, Promises: Disability and Terms of Inclusion* (Federation Press, 2000), Gerard Goggin and Christopher Newell, *Disability in Australia: Exposing a Social Apartheid* (University of New South Wales Press, 2000), Corinne Manning, *Bye-Bye Charlie: Stories from the Vanishing World of Kew Cottages* (University of NSW Press, 2008).

⁷ See, eg, Diana Wyndham, *Eugenics in Australia: Striving for National Fitness* (Galton Institute, 2003), Stephen Garton, 'Eugenics in Australia and New Zealand: Laboratories of Racial Science' in Alison

In the 1890s, the Colony of NSW introduced a non-contributory invalid pension for people with permanent disabilities.⁸ In 1908, the Commonwealth government assumed responsibility for providing disability pensions.⁹ While Australian governments have engaged in the provision of disability support and services since the beginning of the 20th century, these were largely ad hoc and provided through large institutions and asylums, which were, in most cases, run by charity organisations.¹⁰ The return of veterans from the Second World War resulted in improvements of the situation of people with disabilities.¹¹ As the size of the disabled population greatly increased with war veterans, people with disabilities could no longer be categorised as undeserving and under-achieving. In 1948, the Commonwealth Rehabilitation Service was founded to assist injured servicemen and women, and those receiving invalid pensions.¹² In the meantime, segregation of people with severe disabilities still remained widespread and parents were encouraged to place their disabled children in residential care.¹³

A significant change came in disability policy under the Whitlam Labor government (1972-75).¹⁴ The Whitlam government made disability a national social policy priority. From its first budget, the government raised the invalid pension and also enacted reforms to create four new social security benefits, including the handicapped children's allowance to guardians of severely disabled children. The *Handicapped Persons Assistance Act 1974* (Cth)¹⁵ was adopted, enabling disability non-profit organisations with funding to provide housing and social care to people with disabilities. 'It was a time of optimism, where government responded to the needs of oppressed groups, and where the other was enabled to have a voice within the policy,' writes Carling-Jenkin.¹⁶

Bashford and Philippa Levine (eds), *The Oxford Handbook of the History of Eugenics* (Oxford University Press, 2010) 243.

⁸ Goggin and Newell, above n 6, 63.

⁹ *Invalid and Old-age Pensions Act 1908* (Cth) (repealed on 1 July 1947) pt IV.

¹⁰ See, eg, Brian Dickey, *No Charity There: A Short History of Social Welfare in Australia* (Allen & Unwin, 1987).

¹¹ Carling-Jenkins, above n 1, 47.

¹² *Ibid.*

¹³ *Ibid* 6-8.

¹⁴ See Craig Wallace, Only Human — Disability in Australian Politics (Part 2: Human Rights and Human Laws) (Blog post, 3 December 2016) <<http://moadoph.gov.au/blog/only-human-part-2/>>.

¹⁵ *Handicapped Persons Assistance Act 1974* (Cth).

¹⁶ Carling-Jenkins, above n 1, 52.

The disability welfare program continued with the Fraser Coalition government (1975-83). In fact, despite the government's efforts to restrain public expenditure, funding to disability programs continued growing in relation to the growing international attention to disability and shifting social attitudes about entitlements of people with disabilities.¹⁷ Disability non-profit organisations, which started forming in Australia in the late 1800s,¹⁸ were fundamentally changed. The IYDP generated hundreds of events across the country, resulting in the emergence of rights-focused and cross-disability organisations.¹⁹ After the First Handicapped Persons Conference held in Australia in 1980, People with Disability Australia (PwDA) was founded.²⁰ The World Congress of DPI resulted in the establishment of DPI Australia, the first national representative body of people with disabilities.²¹

Australian disability policies further developed under the Hawke Labor government (1983-91).²² In 1983, a review of the handicapped person's welfare program was commenced, and the review recommendations reflected extensive direct input from people with disabilities for the first time.²³ The *New Directions* report called for legislative reform, including the adoption of disability service and anti-discrimination legislation, more clearly defined roles for the States and the Commonwealth, changes to

¹⁷ Karen Soldatic and Barbara Pini, 'Continuity or change? Disability policy and the Rudd government' (2012) 11(02) *Social Policy and Society* 183, 184. By that time, the UN endorsed the Declaration on the Rights of Disabled Persons in 1975 and proclaimed 1981 as the International Year of Disabled Persons.

¹⁸ Margaret Cooper, 'The Australian Disability Rights Movement Lives' (1999) 14(2) *Disability & Society* 217, 218. For example, the Australian Association of the Blind was established in 1896 and the Blind and Professional Guild was established in 1944. The West Australian and New South Wales Civilian Maimed and Limbless Associations formed in 1949 and the Victorian Disabled Motorists' Association formed in 1954. The Victorian Paraplegic and Quadriplegic Association was founded in 1962 and the Australian Quadriplegics Association NSW begun in 1967.

¹⁹ Ibid. Cooper, citing Campbell and Oliver, argues that the older social movements tended to campaign on single issues, and were led by experts and saw parliamentary lobbying as their only tactic. See also Helen Meekosha, 'Virtual Activists? Women and the Making of Identities of Disability' (2002) 17(3) *Hypatia* 67.

²⁰ See People with Disability Australia, *Our History* (2010)

< <http://www.pwd.org.au/about-us/our-history.html> >.

²¹ Heidi Forrest and Phillip French, 'Voices Down Under: An Australian Perspective' in Marianne Schulze Maya Sabatello (ed), *Human Rights and Disability Advocacy* (University of Pennsylvania Press, 2014) 188, 189. The World Congress of DPI was organised in Singapore in 1981. See section III(C) of Chapter Four.

²² See Department of Health, Housing and Community Services, 'Social Justice for People with Disabilities: Tabling Statement by the Minister for Health, Housing and Community Services' (Australian Government Publishing Service, Canberra, 1991).

²³ See Commonwealth of Australia, *New Directions: Report of the Handicapped Program Review*, (Australian Government Publishing Service, 1985). The review received over 3000 submissions from people with disabilities.

income support including an increased range of payments and provision of funding to 'self-help' groups. The government provided funding to many DPOs, enabling them to set up branches. The Disability Advisory Council of Australia, which was mandated to provide independent advices to Ministers, was established.²⁴

In 1985, the Office of Disability was established within the Department of Community Services and Health. The *Disability Services Act 1986* (Cth)²⁵ (*DSA*) was adopted as the primary legal framework for administration of disability services. Disability advocacy was recognised as an area to be funded under the *DSA*, leading to the establishment of hundreds of disability advocacy groups. Community care started replacing segregated institutions and people with disabilities relocated from nursing homes and hostels into community housing.²⁶ Although deinstitutionalisation represented significant progress, it introduced a new challenge as communities were not prepared to provide adequate, accessible and appropriate living conditions for people with disabilities. An AHRC inquiry found that poorly-planned deinstitutionalisation left many people, particularly the thousands of Australians with mental illness, amongst the homeless.²⁷

Disability reforms undertaken by the Hawke government continued under Paul Keating's prime ministership (1991-96).²⁸ In 1992, the Commonwealth and State governments concluded the first five-year disability service administration agreement — a practice that still continues today.²⁹ Under the agreement, the Commonwealth took responsibility for employment services and the provision of disability pensions, while the States and Territories became responsible for accommodation and other support services. Disability advocacy remained the responsibility of both governments.

²⁴ Department of Health, Housing and Community Services, 'Social Justice for People with Disabilities: Tabling Statement by the Minister for Health, Housing and Community Services' (Australian Government Publishing Service, 1991) 13.

²⁵ *Disability Services Act 1986* (Cth).

²⁶ Soldatic and Pini, above n 17, 185. While deinstitutionalisation was encouraged by a social justice agenda, the influence of an economic agenda was also very apparent.

²⁷ Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (Australian Government Publishing Service, 1993) 555.

²⁸ Soldatic and Pini, above n 17, 186.

²⁹ See, eg, Anna Yeatman, 'Getting Real: The Final Report of the Review of the Commonwealth/State Disability Agreement' (1996). The latest National Disability Agreement (NDA) was adopted in 2013. The NDA is one of six national agreements between the Commonwealth, states and territories in place across health, education, skills, workplace development, disability services, affordable housing and indigenous reform.

However, in relation to the economic crises of the early 1990s and the associated prominence of neoliberalism, the policy focus was given to labour market participation of people with disabilities.³⁰

Following the release of the *Working Nation* scheme,³¹ the *Disability Employment Program* was reviewed in 1994.³² Driven by willingness to control social welfare expenditure, the review recommended the strengthening of the relationship between the invalid pension and labour market participation of people with disabilities.³³ Soon after, all social security programs, including the invalid pension, were reviewed and the disability support pension replaced the invalid pension.³⁴ Reflecting the growing trend of neoliberalism, the disability support pension sought to move people with disabilities from welfare to employment.³⁵ Despite the disability movement's campaign for closing down sheltered employment, the Keating government promoted it as an option for people with disabilities, who were deemed unable to compete in a highly unregulated labour market.³⁶ This was the context in which the *Disability Discrimination Act 1992* (Cth)³⁷ (*DDA*) was adopted.

Soldatic and Pini argue that the primary purpose of the *DDA* was to reduce the potential challenges of an open labour market for people with disabilities.³⁸ In contrast, human rights scholars celebrate the *DDA* as the second oldest national legislation in the world, outlawing discrimination against the people with disabilities. It was adopted in order to give effect to Australia's obligations under the *ILO Discrimination (Employment and*

³⁰ In 1991, Australia was in the midst of a prolonged economic recession, with eight-quarters of declining economic growth. Unemployment reached 11.4 per cent at the end of 1992 — the highest level since the Great Depression. In response to the crisis, the Keating government announced the *One Nation* economic program in February 1992. See National Archives of Australia, *Australia's Prime Ministers* <<http://primeministers.naa.gov.au/primeministers/keating/in-office.aspx>>.

³¹ See Prime Minister of Australia, 'Working Nation: The White Paper on Employment and Growth' (Australian Government Publishing Service, 1994).

³² Peter Baume and Kathleen Kay, *Working Solution: Report of the Strategic Review of the Commonwealth Disability Services Program* (Australian Government Publishing Service, 1995).

³³ Soldatic and Pini, above n 17, 186.

³⁴ *Social Security (Disability and Sickness Support) Act 1991* (Cth).

³⁵ Jerry Ford and Els McElwaine, 'Impact of the National Economic Reform Agenda on People with Severe Disabilities' (1994) 4 *Australian Disability Review* 13.

³⁶ Soldatic and Pini, above n 17, 186.

³⁷ *Disability Discrimination Act 1992* (Cth).

³⁸ Soldatic and Pini, above n 17, 185.

Occupation) Convention³⁹ and two UN declarations concerning the rights of people with disabilities.⁴⁰ While it is hard to pinpoint the actual impetus for creating this piece of legislation, the *DDA* made a significant difference in improving the accessibility of urban centres and shifting the culture, especially of large employers.⁴¹

During the term of the Howard Coalition government (1996-2007), a market-dominated public policy agenda heightened.⁴² The Howard government targeted community engagement in policy-making as one of its principal areas of reform.⁴³ In 1999, the National Disability Advocacy Program was reviewed and the report recommended the increased representation of families in the advocacy processes.⁴⁴ Some commentators were concerned that the increased participation of families, who may not always have the same interests and preferences as people with disabilities, may have diminished the direct views of people with disabilities.⁴⁵ Meantime, the government refused to implement the recommendations of the Productivity Commission's 2004 review of the *DDA*,⁴⁶ which suggested a range of measures to strengthen its effectiveness.⁴⁷

In general, human rights and civil society institutions were significantly weakened under the Howard government. The AHRC had a budget cut of 40 per cent over first

³⁹ *Convention concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, ILO Convention No 111 (entered into force 15 June 1960).

⁴⁰ *Declaration on the Rights of Mentally Retarded Persons; Declaration on the Rights of Disabled Persons*.

⁴¹ For example, the *Commonwealth Disability Strategy* was adopted to provide a ten-year framework to assist Australian government agencies in meeting their obligations under the *DDA*. The Strategy required Commonwealth agencies to remove barriers that prevent people with disabilities from having access to policies, programmes and services and provide data on their performance against the framework in their respective annual reports. See Australian Government, *Commonwealth Disability Strategy 1994-2004* (February 1994). But see Erebus International, *Report of the Evaluation of the Commonwealth Disability Strategy* (Erebus, 2006)

<https://www.dss.gov.au/sites/default/files/documents/05_2012/cds_evaluation2006.pdf>. Claims made that the *Strategy*, which was overtaken by the *National Disability Strategy 2010-20*, has not been successfully implemented.

⁴² Carling-Jenkins, above n 1, 54. The intensification of neoliberalism under the Howard government is illustrated by the marginalisation of consumer representation from the policy process, the widespread adoption of privatisation, including the engagement of the community sector in state-market contractual relations and the reworking of the welfare and labour-market nexus.

⁴³ Soldatic and Pini, above n 17, 187.

⁴⁴ See Department of Family and Community Services, *National Disability Advocacy Program Review Report* (1999) 4.

⁴⁵ Soldatic and Pini, above n 17, 187.

⁴⁶ Attorney-General's Department (Cth), *Government's response to the Productivity Commission's Review of the Disability Discrimination Act 1992* (25 January 2005)

<<http://webarchive.nla.gov.au/gov/20050705110657/http://ag.gov.au/PCDDA>>.

⁴⁷ Productivity Commission, *Review of the Disability Discrimination Act 1992*, Report No 30 (2004).

three years of the government and the position of Disability Discrimination Commissioner ceased to be filled by a separate appointment in 1997.⁴⁸ Civil society involvement in policy-making was diminished. On this, Sarah Maddison et al write:

Signs of this shift were apparent in the Hawke-Keating years, but it was with the election of the Howard Government in 1996 that this view came to dominate policy-making processes. Prime Minister Howard himself has challenged the legitimacy and collective action in the policy-sphere... There has been a 'hostile, negative and often emotional campaign' to undermine the credibility of NGOs. Tactics include freezing out and defunding uncooperative organisations, use of intimidatory methods, and micro-management of relationship between the government and peak organisations.⁴⁹

At the international level, the Howard government positioned Australia as a leading critic of the UN and refused to cooperate with the international human rights treaty regime.⁵⁰ However, the government signed the *Disabilities Convention* on the day it opened for signature, making Australia one of the first countries to do so.

III IMPLEMENTATION OF THE *DISABILITIES CONVENTION* IN AUSTRALIA

A *Ratification of the Disabilities Convention*

Australia signed the *Disabilities Convention* on 30 March 2007, ratified it on 17 July 2008 and the *Convention* entered into force for Australia on 16 August 2008. Australia acceded to the *Optional Protocol* on 21 August 2009, which entered into force on 19 September 2009. In relation to the impending inaugural election of the CRPD Committee and to secure the opportunity for Australia to nominate a candidate, the *Convention's* ratification was made as a matter of urgency.⁵¹ The speedy ratification was made possible by the official view that 'there are no significant financial or

⁴⁸ Spencer Zifcak, *Mr Ruddock Goes to Geneva* (UNSW Press, 2003) 65.

⁴⁹ Sarah Maddison, Richard Dennis and Clive Hamilton, 'Silencing Dissent: Non-government organisations and Australian democracy' (Discussion Paper No 65, The Australia Institute, 2004) viii.

⁵⁰ See, eg, Sarah Joseph, 'The Howard Government's Record of Engagement with the International Human Rights System' (2008) 27 *Australian Yearbook of International Law* 45; Zifcak, above n 48; Hilary Charlesworth, 'Human Rights: Australia versus the UN' (Discussion paper No 22/06, Democratic Audit of Australia, 2006).

⁵¹ Graeme Innes, 'Going for Gold: Implications of the Convention on the Rights of Persons with Disabilities for Australian Law and Social Policy' (Paper presented at Human Rights Indicator's Seminar, Brisbane, 20 August 2008) <<https://www.humanrights.gov.au/news/speeches/innes-going-gold>>.

regulatory implications of ratifying the *Convention* on Australia.⁵² Moreover, the NIA enumerated the following expected outcomes of the ratification:

Ratification of the *Convention* is likely to: raises awareness of disability issues and foster a more inclusive and cohesive society by giving prominence to ensuring human rights are afforded to all people, including people with disability; promote the active participation of people with disability in the community, including workforce participation, which may reduce pressure on welfare services; enhance the independence of people with disability, thereby potentially reducing direct support services costs; promote universal design, resulting in more accessible and therefore more functional and sustainable built and information environments; and improve the self-esteem of people with disability, enabling them to enjoy their inherent dignity and respect.⁵³

In ratifying the *Convention*, Australia made a *Declaration* setting out its understanding of articles 12, 17 and 18, concerning substituted decision-making, compulsory treatment of people with disabilities, and immigration processes. The *Declaration* reads:

Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the *Convention* allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards;

Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the *Convention* allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards;

Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the *Convention* does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.⁵⁴

⁵² Attorney-General's Department (Cth), *National Interest Analysis on United Nations Convention on the Rights of Persons with Disabilities* (ATNIA 18, Tabled on 4 June 2008) 2(5).

⁵³ *Ibid* 3(7).

⁵⁴ United Nations Office of Legal Affairs, *United Nations Treaties Collection, Chapter IV, Human Rights, Convention on the Rights of Persons with Disabilities* (01 February 2017) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en>.

Australian disability organisations questioned the necessity and legal status of the ‘strongly worded’ *Declaration* and demanded the withdrawal.⁵⁵ Moreover, in reviewing the Australian government’s initial report on the implementation of the *Disabilities Convention* in September 2013, the CRPD Committee recommended that Australia review the *Declaration* with the view to withdrawing it.⁵⁶

In May 2008, JSCOT opened an inquiry to consider the implications of the *Disabilities Convention* on Australia. Two weeks after the opening of the inquiry, the Committee issued a brief report, recommending ratification of the *Convention*.⁵⁷ In *Report No 95*,⁵⁸ JSCOT considered the matter in a fuller manner and made two additional recommendations, including (1) to consider expanding the role of the AHRC by enabling the Commissioner to provide the Parliament with an annual report on the implementation of the *Convention*;⁵⁹ (2) to review the provisions of the *Migration Act 1958* (Cth)⁶⁰ and the implementation of migration policies to ensure that there is no direct or indirect discrimination against persons with disabilities.⁶¹ The implementation of the two recommendations is discussed below.

Internationally, Australia’s engagement with the *Convention* was significant. The Australian delegation contributed actively to the *Convention*’s drafting.⁶² On 3 September 2008, Australia nominated Professor Ronald McCallum for election to the inaugural CRPC Committee. On 3 November 2008, Professor McCallum was elected as one of 12 Committee members and, in October 2009, was elected as the chair of the

⁵⁵ Disability Representative, Advocacy, Legal and Human Rights Organisations, *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities* (2012) [38-9], [47-8], [49-50], [185-189], [300-06], [315-20].

⁵⁶ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) paras 8-9 (*CRPD Concluding Observations on Australia 2013*).

⁵⁷ Joint Standing Committee on Treaties, Parliament of Australia, *Report No 92: Treaty tabled on 4 June* (June 2008) 2[1]. The Committee stated that:

In order to facilitate the timely implementation of the *United Nations Convention on the Rights of Persons with Disabilities* ...the Committee resolved to report its recommendation on the treaty to the Parliament immediately and will provide a more detailed report on the provisions of the Agreement at a later date.

⁵⁸ Joint Standing Committee on Treaties, Parliament of Australia, *Report No 95: Treaties tabled on 4 June, 17 June, 25 June and 26 August 2008* (October 2008) (*JSCOT Report No 95*).

⁵⁹ *Ibid* recommendation 1.

⁶⁰ *Migration Act 1958* (Cth).

⁶¹ *JSCOT Report No 95*, above n 58, recommendation 2.

⁶² See Part III(A) of Chapter Seven.

Committee. Professor McCallum served on the CRPC Committee until December 2014, and chaired it until 2013. The following sections discuss the immediate implementation of the *Convention* by the Australian government and the effects of the *Convention* on Australian jurisprudence.

1 *The AHRC and the Disabilities Convention*

In response to the first recommendation of JSCOT, the Commonwealth Attorney-General consulted with States and Territories and declared the *Disabilities Convention* to be a ‘relevant international instrument’ for the purpose of the *AHRC Act* on 20 April 2009.⁶³ The Declaration enabled the AHRC to exercise its powers with direct reference to the *Convention*, including receiving complaints from individuals about breaches of *Convention* rights. If the Commission finds a breach of a *Convention* right, it reports the breach to Attorney-General with recommendations for preventing a repetition of the act or continuation of the practice, as well as the payment of compensation.⁶⁴ Since 2009, the AHRC receives complaints on the basis of a breach of the *Disabilities Convention*. The Commission received four such complaints in 2009-10,⁶⁵ 27 in 2011-12,⁶⁶ 10 in 2012-13,⁶⁷ 38 in 2013-14,⁶⁸ 10 in 2014-15⁶⁹ and two in 2015-16.⁷⁰ As discussed in Chapter Five, a majority of complaints received by the AHRC are resolved through a private conciliation, whose outcomes are confidential.

The Declaration also designates the AHRC to be an independent monitoring mechanism under article 33(2) of the *Convention*,⁷¹ whereas the Attorney-General’s Department and the Department of Families, Housing, Community Services and Indigenous Affairs

⁶³ *Convention on the Rights of Persons with Disabilities Declaration 2009* (Cth) s 4. The *AHRC Act* provides that the Minister may, after consulting the appropriate Minister of each State by writing, declare an international instrument ratified or acceded to by Australia to be an instrument relating to human rights and freedoms for the purposes of the Act. See *AHRC Act*, sub-s 47(1).

⁶⁴ *AHRC Act* s 29.

⁶⁵ Australian Human Rights Commission, *Annual Report 2010-2011* (2011) 117.

⁶⁶ Australian Human Rights Commission, *Annual Report 2011-2012* (2012) 142.

⁶⁷ Australian Human Rights Commission, *Annual Report 2012-2013* (2013) 145.

⁶⁸ Australian Human Rights Commission, *Annual Report 2013-2014* (2014) 152.

⁶⁹ Australian Human Rights Commission, *Annual Report 2014-2015* (2015) 156.

⁷⁰ Australian Human Rights Commission, *2015-2016 Complaint Statistics* (2016) <<http://www.humanrights.gov.au/sites/default/files/AHRC%202015%20-%202016%20Complaint%20Statistics.pdf>>.

⁷¹ Explanatory Statement, *Convention on the Rights of Persons with Disabilities Declaration 2009* (Cth) 2.

were designated as joint focal points for implementation and coordination.⁷² Additionally, the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth)⁷³ amended the *DDA* and inserted an explicit reference to the *Disabilities Convention* in section 12 of the Act, which sets out the circumstances in which the *DDA* applies.⁷⁴ The amendment strengthens the constitutional basis for the *DDA* and ensures its broad operation.⁷⁵

2 *The effects of the Disabilities Convention on Australian laws*

The *Disabilities Convention* made a modest difference in Australian jurisprudence. Given that the *Convention* is not enforceable as domestic law in Australia, this is hardly surprising. As Ron McCallum observes, a number of court decisions referred to the *Convention*, but, in none of them, was the *Convention* definitive.⁷⁶ However, in one case, *Nicholson v Knaggs*,⁷⁷ Vickery J of the Supreme Court of Victoria referred to article 12 of the *Disabilities Convention* concerning legal capacity in reshaping the common law principle of undue influence.⁷⁸ Regarding the decision, McCallum writes:

While article 12 was by no means decisive, its status as a provision of a Convention which had been ratified by the Government of Australia was of significance. *Nicholson v Knaggs* has been cited in several subsequent cases, however, none of these citations concerned testamentary incapacity due to undue influence. We shall have to await further decisions to see if Vickery J's more flexible rule becomes accepted by Australia's courts.⁷⁹

⁷² Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities: Initial Report Submitted by Australia under article 35 of the Convention*, UN Doc CRPD/C/AUS/1 (7 June 2012) para 212.

⁷³ *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).

⁷⁴ *Ibid* s 12(8)(ba).

⁷⁵ Australian Human Rights Commission 'Improved Rights Protection for People with Disability: Commentary of the 2009 changes to the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) and related measures' (2009) 2.

⁷⁶ Ron McCallum, 'The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections' (Legal Studies Research Paper, No 10/30, Sydney Law School, March 2010). The cases referred to by McCallum include, *Devers v Kindilan Society* [2009] FCA 1392 (Unreported, 27 November 2009), *Halsbury v Halsbury* (stay application) [2009] FamCAFC 142 (11 August 2009)(unreported), *Kracke v Mental Health Review Board* [2009] VCAT 646 (Unreported, Bell P, 23 April 2009), *Sales v Minister for Immigration and Citizenship* (2007) 99 ALD 523, [2007] FCA 2094, *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Jansen* (2008) 166 FCR 428, [2008] FCAFC 48 (4 April 2008).

⁷⁷ *Nicholson & Ors v Knaggs & Ors* [2009] VSC 64.

⁷⁸ *Ibid* 13, 19, 61, 64, 69-70, 74-75, 126.

⁷⁹ McCallum, above n 76, 13 (footnote omitted).

3 *Communications to the CRPD Committee*

Under the *Optional Protocol*, the CRPD Committee receives a complaint that is called as a communication from individuals and groups from Australia who have exhausted the domestic remedies. After hearing a communication, the Committee issues an opinion that is called a view. As with all human rights treaty bodies, the views of the CRPD Committee are not binding and do not create a tangible result for complainants, if Australia rejects such views. As of January 2017, 12 communications were filed at the CRPD Committee against the Australian government and three of them were considered. In March 2015, the CRPD Committee considered a complaint by A.M. who was represented by the Australian Centre for Disability Law, alleging the lack of Australian sign language (Auslan) interpretation for jurors.⁸⁰ The complaint was dismissed on the ground of the lack of ‘victim status’ as A.M. had not been called on to perform jury service.

The Committee re-considered the matter in relation to communications submitted by two Australian citizens, Michael Lockrey and Gemma Beasley, both of whom were summoned for jury service in NSW and wanted to serve.⁸¹ The two persons requested assistive technology and service in order for serving the duty.⁸² The Sheriff’s Office rejected their requests, saying that the provision of audio captioning was too cost intensive and that the involvement of an interpreter would undermine the confidentiality of jury deliberations by the addition of a non-jury person. The CRPD Committee found that the Australian government was in breach of its obligations under the *Disabilities Convention* in both cases as it did not provide any evidence that providing a sign language interpreter steno-captioning would affect the complexity, cost or duration of trials to such an extent that its provision would constitute undue burden for the State. The Committee decisions concerning these cases were adopted in May 2016 and the Australian government was given six months to formally respond to the views. No formal record was found regarding Australia’s response to these cases as of April 2017.

⁸⁰ CRPD Committee, *Decision: Communication No 12/2013*, 13th sess, UN Doc CRPD/C/13/D/12/2013 (29 May 2015) (*A.M v Australia*).

⁸¹ CRPD Committee, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/11/2013 (25 April 2016) (*Beasley v Australia*), CRPD Committee, *View: Communication No 13/2013*, 15th sess, UN Doc CRPD/C/15/D/13/2013 (25 April 2016) (*Lockrey v Australia*).

⁸² Lockrey is a deaf person and requires real-time audio captioning in order to communicate in formal settings and Beasley needs a sign language interpreter.

As of May 2017, eight communications against the Australian government were pending at the CRPD Committee, including three cases concerning institutionalisation of people with intellectual impairment, two cases concerning incarceration in high security units of a person with intellectual impairment declared unfit to stand trial, one case alleging a denial of the right to cast a secret vote for a person with cerebral palsy, once case alleging a denial of a working visa for medical reasons and one case concerning exclusion of a deaf person from the exercise of jury duty.⁸³

B *Legal and policy reforms of Australia*

Since 2007, Australian disability laws and policies have been reformed at the Commonwealth and State levels. For example, all but one of eight Australian jurisdictions reviewed their mental health laws,⁸⁴ and, according to the reviewing authorities, such legislative changes sought to implement the obligations under the *Disabilities Convention*.⁸⁵ The Australian aid program strategy on disability inclusion was also adopted in 2008.⁸⁶ As the strategy states, '[it is] based on the *Disabilities Convention* and contributes to meeting Australia's obligations under Article 32'⁸⁷ as well as its commitments to engage with the international community to improve the protection and promotion of human rights. Regarding these burgeoning developments, Gerard Goggin and Dinesh Wadiwel write, 'formerly on the margins of policy

⁸³ United Nations Office of the High Commissioner for Human Rights, *Table of Pending Cases before the Committee on the Rights of Persons with Disabilities considered under the Optional Protocol to the Convention on the Rights of Persons with Disabilities* (September 2016)

<<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Tablependingcases.aspx>>.

⁸⁴ Only jurisdiction, which has not reviewed a mental health legislation is Northern Territory. But it adopted a new legislation on guardianship for adults with impaired decision-making capacity, which the government claims to have reflected the *Disabilities Convention*. See Northern Territory Government, Department of Health, *Office of the Public Guardian* (22 January 2018) <<https://health.nt.gov.au/professionals/office-of-the-public-guardian>>.

⁸⁵ Five States and the ACT adopted a new legislation on mental health and the Chief Psychiatrist of South Australia has reviewed the existing legislation. The new legislations include *Mental Health Act 2015* (ACT), *Mental Health Amendment (Statutory Review) Act 2014* (NSW), *Mental Health Act 2016* (Qld), *Mental Health Act 2013* (Tas) and *Mental Health Act 2014* (WA). See Sascha Callaghan and Christopher James Ryan, 'An Evolving Revolution: Evaluating Australia's Compliance with the Convention on the Rights of Persons with Disabilities in Mental Health Law' (2016) 39(2) *University of New South Wales Law Journal* 596.

⁸⁶ Australian Agency for International Development (AusAID) 'Development for All: Development for All: Towards a Disability Inclusive Australian Aid Program (2009-14)' (November 2008)

<<http://dfat.gov.au/about-us/publications/Documents/dev-for-all.pdf>>.

⁸⁷ Attorney-General's Department (Cth), *Australia's Universal Periodic Review 2011: National Report* (October 2010) [85].

discussions, disability is now at centre-stage.’⁸⁸ This section discusses the implications of the *Disabilities Convention* on Australian policy changes focusing on disability service reforms. Section III(D) discusses some other legislative reviews that have been taken place at the Commonwealth level, highlighting their limited outcomes.

1 *Commonwealth legal and policy reforms*

Three months after the *Convention*’s ratification, in October 2008, the Rudd Labor government released a discussion paper with the intention of drafting a national policy concerning people with disabilities.⁸⁹ Prior to that, in September 2008, the National People with Disabilities and Carer Council (NPDCC) was established with the intended purpose of undertaking a national consultation and advising on the drafting of the national policy.⁹⁰ The NPDCC consisted of 28 representatives of people with disabilities, carers and service providers, and was headed by a long-time disability activist, Rhonda Galbally. The national disability consultation was carried out in 2009, resulting in the seminal *Shut Out* report.⁹¹ The report identified compelling evidence of the injustice and disadvantage that Australians with disabilities experience in their daily lives and recommended the adoption of a national policy.⁹²

In November 2009, Prime Minister Rudd announced the development of a national disability strategy as a central mechanism to implement the *Disabilities Convention* in Australia.⁹³ A draft national disability strategy was released in July 2010. On 13

⁸⁸ Gerard Goggin and Dinesh Wadiwel ‘Australian Disability Reform and Political Participation’ (Paper presented at the Symposium on Reform and Rhetoric in Australian Social Policy, University of Sydney, September 2014) <http://www.australianreview.net/digest/2014/09/goggin_wadiwel.html>.

⁸⁹ The Commonwealth of Australia, *Developing a National Disability Strategy for Australia: Access, Inclusion, Participation* (Discussion Paper for Consultation, October 2008).

⁹⁰ National People with Disabilities and Carer Council, *Shut Out: The Experience of People with Disabilities and Their Families in Australia, National Disability Strategy Consultation Report* (2009) vi (*Shut Out* report) <https://www.dss.gov.au/sites/default/files/documents/05_2012/nds_report.pdf>.

⁹¹ Ibid.

⁹² Ibid 61-3.

⁹³ Graeme Innes, ‘National Disability Strategies as tools for implementing the Convention on the Rights of Persons with Disabilities’ (Paper presented at Centre for Disability Law and Policy, University College Galway, Ireland, delivered via video link, 10 December 2010) <<https://www.humanrights.gov.au/news/speeches/national-disability-strategies-tools-implementing-convention-rights-persons>>.

February 2011, COAG endorsed the *National Disability Strategy (2010-2020) (NDS)*.⁹⁴ The *NDS* was the first national policy in Australia addressed to people with disabilities.

In September 2009, in relation to the COAG commitment to a national disability strategy, the Rudd government announced a decision to investigate a new approach to disability care and support, and referred an inquiry on the issue to the Productivity Commission in February 2010. In July 2011, the Commission released the inquiry report, concluding that ‘the current system of disability service is underfunded, unfair, fragmented and gives people with disabilities a little choice and no certainty of access to appropriate supports.’⁹⁵ The Commission recommended a national disability insurance scheme (NDIS) to provide insurance cover for all Australians in the event of significant disability, and proposed the scheme’s basic features.⁹⁶ In response to the inquiry, COAG established a Select Council on Disability Reform to undertake ‘a careful and considered approach to the scheme by all levels of government’.⁹⁷

In October 2011, the Select Council on Disability Reform announced an agreement to lay the foundations of NDIS by mid-2013.⁹⁸ In July 2012, an agreement was made at COAG to proceed with the NDIS launch and the *Intergovernmental Agreement for the NDIS Launch* was signed in December 2012. In March 2013, the *National Disability Insurance Scheme Act 2013 (Cth)* (the *NDIS Act*)⁹⁹ was adopted. The *NDIS Act* is supplemented by a number of rules and operational guidelines, regulating the detailed procedures of the scheme.¹⁰⁰ In July 2013, the NDIS began in four trial sites, including

⁹⁴ Council of the Australian Governments, *National Disability Strategy 2010-2020* (2011) (*National Disability Strategy*) <https://www.dss.gov.au/sites/default/files/documents/05_2012/national_disability_strategy_2010_2020.pdf>.

⁹⁵ Productivity Commission, *Disability Care and Support*, Report No 54 (2011) vol 1, 2.

⁹⁶ Ibid.

⁹⁷ For specific issues of national interest, COAG work through time-limited councils. The Select Council on Disability Reform consisted of the Treasurers and Disability Service Ministers the Commonwealth and State and Territory governments. Due to the adoption of the *National Disability Insurance Scheme Act 2013 (Cth)*, the Select Council on Disability Reform expired on 31 December 2012.

⁹⁸ Select Council on Disability Reform, Meeting Communiqué (20 October 2011).

⁹⁹ *National Disability Insurance Scheme Act 2013 (Cth)* (*NDIS Act*).

¹⁰⁰ *National Disability Insurance Scheme (Children) Rules 2013 (Cth)*, *National Disability Insurance Scheme (Nominee) Rules 2013 (Cth)*, *National Disability Insurance Scheme (Plan Management) Rules 2013 (Cth)*, *National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013 (Cth)*, *National Disability Insurance Scheme (Registered Providers of Supports) Rules 2013 (Cth)*, *National Disability Insurance Scheme (Becoming a Participant) Rules 2013 (Cth)*, National Disability Insurance Agency, *Nominees-Overview*, Operational Guideline (2013), National Disability Insurance Agency, *Nominees-Whether a Nominee Is Necessary*, Operational Guideline (2013); National Disability

Tasmania, South Australia, the Barwon area of Victoria, and the Hunter area of NSW. In July 2014, the NDIS commenced trials in the ACT, in the Barkly region of the Northern Territory, and in the Perth Hills area of Western Australia. The full implementation of the scheme is expected to be achieved by 1 July 2018.

Referred to widely as a ‘once in a generation reform,’ the NDIS transformed the funding and concepts of Australian disability services. The NDIS enables people with severe and profound disabilities, who are under the age of 65, to receive an individualised care and support package.¹⁰¹ It means that, instead of resorting to a predetermined package of disability support and services, the scheme participants will choose the types of services they get and the ways that services are delivered. The National Disability Insurance Agency — the scheme’s administration — facilitates and informs clients in designing individual plans to reflect their support needs and life choices, and the funding is allocated on the basis of individual’s needs. When it is fully operational, NDIS is estimated to cost over AU \$22 billion per year with all Australian governments sharing the scheme’s cost. In July 2014, in order to meet the Commonwealth government’s funding commitment to the NDIS, the Medicare levy paid by all Australian taxpayers was increased by 0.5 per cent — from 1.5 to 2 per cent.¹⁰²

The UN human rights bodies celebrated both the *NDS* and the *NDIS Act* as major achievements of the *Disabilities Convention* in Australia.¹⁰³ The texts of the *NDS* and *NDIS Act* demonstrate their close ties with the *Convention*. As mentioned, the *NDS* was adopted as a tool to implement the *Convention* in Australia. It envisions ‘an inclusive Australian society that enables people with disability to fulfil their potential as equal citizens.’¹⁰⁴ The *NDS* directly adopts the *Convention’s* principles as its guiding

Insurance Agency, *General Conduct-Supporting Participant’s Decision-Making*, Operational Guideline (2013).

¹⁰¹ Not all people with disabilities are eligible for the NDIS. When it is fully implemented, approximately 460 000 people with significant and permanent disabilities, that is around 10 per cent of the Australian population with disabilities are expected to benefit from the NDIS.

¹⁰² *Medicare Levy Amendment (DisabilityCare Australia) Act 2013* (Cth).

¹⁰³ Human Rights Council, *Report on the Working Group of the Universal Periodic Review: Australia*, UN Doc A/HRC/31/14 (13 January 2016) paras 23, 27, 45, 100, 115 (*UPR Working Group Report on Australia 2016*); Committee on the Rights of Persons with Disabilities, *CRPD Concluding Observations on Australia 2013*, above n 56, paras 4, 6.

¹⁰⁴ *National Disability Strategy*, above n 94, 22.

principles.¹⁰⁵ The six outcome areas and twenty-five policy directions of the *NDS* closely reflect *Convention* norms. The language of the *Convention* is clearly seen in the *NDS*. Surprisingly, however, contrary to the *Convention's* non-exhaustive definition of people with disabilities, which recognises the social dimensions of disability, the *NDS* contains a purely medical definition of disability.¹⁰⁶

The *NDIS Act* references a number of international treaties to which Australia is party.¹⁰⁷ The primary objective of the *Act* is to give effect to Australia's obligations under the *Disabilities Convention*.¹⁰⁸ The specific objectives of the *Act* encompass strong human rights principles such as: 'to support the independence and social and economic participation of people with disability',¹⁰⁹ 'to enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports',¹¹⁰ 'to promote the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in the mainstream community'¹¹¹ and 'to raise community awareness of the issues that affect the social and economic participation of people with disability, and facilitate greater community inclusion of people with disability.'¹¹²

The guiding principles of the *NDIS Act* to some extent reflect *Convention* norms. For example, it affirms the same rights of people with disability as other members of Australian society 'to realise their potential for physical, social, emotional and intellectual development',¹¹³ and 'to respect for their worth and dignity and to live free from abuse, neglect and exploitation.'¹¹⁴ At the same time, those principles

¹⁰⁵ Ibid.

¹⁰⁶ Ibid 23. The *National Disability Strategy* states that:

The term 'people with disability' refers to people with all kinds of impairment from birth or acquired through illness, accident or the ageing process. It includes cognitive impairment as well as physical, sensory and psycho-social disability. There is a more detailed definition of disability in the *Disability Discrimination Act* 1992 (Cth).

¹⁰⁷ The *Act*, in conjunction with other laws, aims to give effect to certain obligations that Australia has as a party to the *ICCPR*, the *ICESCR*, the *CRC*, the *CEDAW* and the *ICERD*.

¹⁰⁸ *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(a).

¹⁰⁹ Ibid s 3(1)(c).

¹¹⁰ Ibid s 3(1)(e).

¹¹¹ Ibid s 3(1)(g).

¹¹² Ibid s 3(1)(h).

¹¹³ Ibid s 4(1).

¹¹⁴ Ibid s 4(6).

acknowledge of potential limitation of capacity of people with disabilities¹¹⁵ as well as the role of families, carers and other significant persons in the lives of people with disabilities.¹¹⁶

Along with these overarching pieces of disability legislation, the Australian government also adopted sector-specific policies, which also reflect *Convention* norms. For example, the Australian aid program strategy on disability inclusion was adopted in 2008.¹¹⁷ The strategy, according to the Australian government, is ‘based on the *Disabilities Convention* and contributes to meeting Australia’s obligations under Article 32 and commitments in our domestic *Human Rights Framework* to engage with the international community to improve the protection and promotion of human rights within our region and around the world.’¹¹⁸

2 State legal reforms

The *Disabilities Convention* not only influenced Commonwealth laws and policies, it has also been reflected in those of the States and Territories. For example, Tasmania and NSW revised their disability service legislation in the last five years. In December 2009, Tasmania began to review the *Disability Services Act 1992* (Tas)¹¹⁹ and the new law was proclaimed on 1 January 2012.¹²⁰ The substance of the *Disability Services Act 2011* (Tas) does not seem to differ much from the previous version, but it provides the procedures to implement the NDIS locally. The Tasmanian Department of Health and Human Services nevertheless claims that the new legislation reflected ‘a broader human rights perspective in line with Australia’s ratification of the *Disabilities Convention*.’¹²¹

¹¹⁵ Ibid ss 4(2), 4(8). Section 4(2) states that ‘people with disability should be supported to participate in and contribute to social and economic life to the extent of their ability.’ Similarly, section 4(8) provides that ‘people with disability have the right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity.’

¹¹⁶ Ibid 4(12).

¹¹⁷ Australian Agency for International Development (AusAID) ‘Development for All: Development for All: Towards a Disability Inclusive Australian Aid Program (2009-14)’ (November 2008) <<http://dfat.gov.au/about-us/publications/Documents/dev-for-all.pdf>>.

¹¹⁸ Attorney-General’s Department (Cth), Australia’s Universal Periodic Review 2011: National Report (October 2010) [85].

¹¹⁹ *Disability Services Act 1992* (Tas).

¹²⁰ *Disability Services Act 2011* (Tas).

¹²¹ Tasmanian Government, Department of Health and Human Services, *Tasmanian Disability Services Act 2011* <http://www.dhhs.tas.gov.au/disability/tasmanian_disability_services_act_2011>. Despite the Ministry’s reference to the *Disabilities Convention* as a reason for revising the Act, the Act itself and the

On 3 December 2014, the *Disability Inclusion Act 2014* (NSW)¹²² and the *Disability Inclusion Regulation 2014* (NSW)¹²³ commenced, replacing the *Disability Services Act 1993* (NSW).¹²⁴ In contrast to the Tasmanian legislation, the NSW legislation embraces human rights principles and aligns with the *Disabilities Convention* in some ways even more closely than the *NDS* and the *NDIS Act*. The *Act* sets out six objects, including ‘to acknowledge that people with disability have the same human rights as other members of the community and that the State and the community have a responsibility to facilitate the exercise of those rights,’¹²⁵ ‘to promote the independence and social and economic inclusion of people with disability’¹²⁶ and ‘to support, to the extent reasonably practicable, the purposes and principles of the *Disabilities Convention*.’¹²⁷

The *Disability Inclusion Act 2014* (NSW) provides general and specific principles to guide its implementation. The general principles, which, according to the NSW Minister for Disability Services John Ajaka, were developed with regard to the *Convention*,¹²⁸ affirm that people with disability have ‘an inherent right to respect for their worth and dignity as individuals,’¹²⁹ ‘the right to participate in and contribute to social and economic life and should be supported to develop and enhance their skills and experience,’¹³⁰ ‘the right to realise their physical, social, sexual, reproductive, emotional and intellectual capacities,’¹³¹ ‘the same rights as other members of the community to make decisions that affect their lives (including decisions involving risk)’ to the full extent of their capacity to do so and to be supported in making those decisions if they

Tasmanian Disability Regulations 2015 (Tas) appear to be the continuations of the *Disability Services Act 1992*. The Act defines disability basically in terms of impairment. As the Ministry explains on the above website that ‘a revised definition of disability which places a greater emphasis on the impact of the disability and includes recognition of disability resulting from cognitive impairment.’ The *Disability Services Act 2011* (Tas) and the *Tasmanian Disability Regulations 2015* protects the rights, but conceptualises them from the consumer point of view. See, eg, *Tasmanian Disability Regulations 2015* (Tas) reg 4(1).

¹²² *Disability Inclusion Act 2014* (NSW).

¹²³ *Disability Inclusion Regulation 2014* (NSW).

¹²⁴ *Disability Services Act 1993* (NSW).

¹²⁵ *Disability Inclusion Act 2014* (NSW) s 3(a).

¹²⁶ *Ibid* s 3(b).

¹²⁷ *Ibid* s 3(e).

¹²⁸ NSW, *Parliamentary Debates*, Legislative Council, 28 May 2014, 20186 (The Hon. John Ajaka, Minister for Ageing, Minister for Disability Services and Minister for Illawara).

¹²⁹ *Disability Inclusion Act 2014* (NSW) s 4(2).

¹³⁰ *Ibid* s 4(3).

¹³¹ *Ibid* s 4(4).

want or require support,¹³² ‘the right to respect for their cultural or linguistic diversity, age, gender, sexual orientation and religious belief’ etc.¹³³ The specific principles recognise the needs of particular groups such as Aboriginal and Torres Strait Islander people with a disability, people with a disability from culturally and linguistically diverse backgrounds and women and children with a disability.¹³⁴

While the *NDS* and *NDIS Act* hold a medical definition of disability that is primarily set out by *DDA*, the *Disability Inclusion Act 2014* (NSW) directly adopts the *Convention*’s definition of disability.¹³⁵ Regarding the statement, Minister Ajaka spoke of that:

The incorporation of the United Nations convention in the definition of ‘disability’ in the objects and principles reflects the New South Wales government’s commitment to the human rights of people with disability in accordance with the highest international standards.¹³⁶

According to the NSW Department of Family and Community Services, the impetus for changing the old legislation was an attitudinal change triggered by the *Disabilities Convention*. On its website, the Department noted that:

[T]here have been major developments in the past decade, including the signing of the *United Nations Convention on the Rights of Persons with Disabilities*. These developments have led to significant changes in disability policy, including a greater emphasis on: (1) recognising the right of people with disability to be in control of their lives and to make or be involved in key decisions; (2) respecting the independence of people with disability and (3) ensuring people with disability can participate fully in the community.¹³⁷

C *Australian disability laws and the Disabilities Convention*

Australia’s speedy ratification relied on the view that its existing laws and policies already complied with the *Convention* norms. In Part II, I demonstrated that, in relation to the IYDP, Australian disability laws departed from the medical approach of disability and started reflecting the principles of human rights. The two major components of

¹³² Ibid s 4(5).

¹³³ Ibid s 4(6).

¹³⁴ Ibid s 5.

¹³⁵ Ibid s 7(1).

¹³⁶ NSW, *Parliamentary Debates*, Legislative Council, 28 May 2014, 20186 (The Hon. John Ajaka, Minister for Ageing, Minister for Disability Services and Minister for Illawara).

¹³⁷ NSW Government, Department of Family and Community Services, *Disability Inclusion Act* (29 April 2016)

<http://www.adhc.nsw.gov.au/about_us/legislation_agreements_partnerships/nsw_disability_inclusion_act>.

Australian disability laws — anti-discrimination and disability service laws — both encompass strong elements of rights. Indeed, as I will discuss in the following chapter, Australian laws provided an important resource for the drafting of the *Convention*, through the active contribution of its delegations. Nevertheless, this claim must be carefully evaluated. Despite the rights-conducive promulgations, the scope and/or underlying philosophy of the two main areas of Australian disability laws differ from the human rights approach to disability.

The *DDA* aims to ‘eliminate, as far as possible, discrimination against persons on the grounds of disability’ in various areas of life enumerated below, ‘to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community,’ and ‘to promote recognition and acceptance within the community of the principle that people with disability have the same fundamental rights as the rest of the community.’¹³⁸ To these ends, the Act prohibits direct and indirect discrimination on the basis of disability in employment,¹³⁹ education,¹⁴⁰ access to premises,¹⁴¹ the provision of goods, services and facilities,¹⁴² the sale of land,¹⁴³ and the administration of Commonwealth laws and programs.¹⁴⁴ A denial of reasonable accommodation is recognised as discrimination under the *DDA* unless such accommodation would amount to an unjustifiable hardship on the provider.¹⁴⁵

The *DDA* applies to both government and private sectors and is administered by the AHRC. The Act encourages public bodies and private companies to devise voluntary disability action plans, which are registered by the AHRC.¹⁴⁶ The *DDA* contains a number of general exemptions on its application.¹⁴⁷ Moreover, the AHRC may grant temporary exemptions from the operation of certain provisions of the Act.¹⁴⁸ In order to assist the implementation of the *DDA*, the government adopted a set of nationally

¹³⁸ *DDA* s 3.

¹³⁹ *Ibid* s 15.

¹⁴⁰ *Ibid* s 22.

¹⁴¹ *Ibid* s 23.

¹⁴² *Ibid* s 24.

¹⁴³ *Ibid* s 26.

¹⁴⁴ *Ibid* s 29.

¹⁴⁵ *Ibid* s 11(1).

¹⁴⁶ *Ibid* s 59-64.

¹⁴⁷ *Ibid* s 45-54.

¹⁴⁸ *Ibid* s 55.

applicable standards, including the *Disability Standards for Accessible Public Transport 2002*,¹⁴⁹ the *Disability Standards for Education 2002*¹⁵⁰ and the *Disability Access to Premises — Buildings Standards 2010*.¹⁵¹

In contrast to the *Disabilities Convention*, the *DDA* has two shortcomings. First, the *DDA* is narrow in scope. It did not cover all areas of life included in the *Convention*. As Lee Ann Bassar observes, the *Convention* ‘encompasses forward-looking, open-ended statements of rights,’ whereas the *DDA* is ‘largely proscriptive and backward looking.’¹⁵² The *DDA* neither imposes positive obligations on duty holders nor does it address the multiple discrimination.¹⁵³ Also, the *DDA* defines disability on the basis of impairment¹⁵⁴ and contains language communicating a different status and the limited capacities of people with disabilities.¹⁵⁵ The CRPD Committee pointed out that ‘the scope of protected rights and grounds of discrimination in the *DDA* is narrower than the *Convention* and does not provide the same level of legal protection to all people with disabilities,’¹⁵⁶ and recommended the strengthening of the Act to address multiple forms of discrimination.¹⁵⁷

The *DDA* is enforced on the basis of individual complaints. The process of lodging complaints under the *DDA* can be onerous and relies heavily on individuals being able to take part in lengthy and costly legal proceedings. It imposes significant personal and financial costs, which may prevent people from taking their concerns forward.¹⁵⁸ Moreover, according to Bassar, the Australian judiciary usually takes ‘literal, restricted

¹⁴⁹ *Disability Standards for Accessible Public Transport 2002* (Cth).

¹⁵⁰ *Disability Standards for Education 2002* (Cth).

¹⁵¹ *Disability Access to Premises — Buildings Standards 2010* (Cth).

¹⁵² Lee Ann Bassar, ‘Are We There Yet? Is Australia Respecting the Rights of Persons with Disabilities’ in Paula Gerber and Melissa Castan (eds), *Contemporary perspectives on human rights law in Australia* (Thomson Reuters (Professional) Australia, 2013) 181, 189.

¹⁵³ *Ibid.*

¹⁵⁴ *DDA* s 4.

¹⁵⁵ *Ibid* s 3. The *DDA* aims to ‘eliminate, as far as possible [emphasis added], discrimination against persons on the grounds of disability’ in various areas of life and ‘to ensure, as far as practicable [emphasis added], that persons with disabilities have the same rights to equality before the law as the rest of the community.’

¹⁵⁶ *CRPD Concluding Observations on Australia 2013*, above n 56, para 14.

¹⁵⁷ *Ibid* para 15.

¹⁵⁸ *Shut Out* report, above n 90, 15-6.

interpretation' in applying *DDA* in court cases, hindering the law's practical effectiveness.¹⁵⁹

The *Disability Services Act 1986* (Cth), along with the *National Standards for Disability Services*¹⁶⁰ and disability service legislation adopted by the States and Territories,¹⁶¹ ensures that available services are delivered in ways that are respectful of dignity, autonomy and the rights of people with disabilities and aims to encourage those people to be included and participate in the society. Despite the rights-based trajectory of these laws, the provision of disability services is not understood as a human right that can be legitimately claimed from the government. Therefore, the termination of an existing service does not constitute a human rights breach and the rights protected by this area of legislation are commonly understood as consumer rights.¹⁶²

Scholars identify the underlying approach of Australian disability laws in various ways.¹⁶³ For example, former chair of the CRPD Committee, Ron McCallum, describes it as 'the needs-based approach' referring to Australia's recognition of the unmet needs of people with disabilities, but not their human rights.¹⁶⁴ While varying approaches to disability and legal entitlement of people with disabilities underpin different areas of laws, it seems that the philosophy of the above-discussed two main areas of disability laws comes closer with the compensatory privilege model of Marcia Rioux.¹⁶⁵ These laws recognise the physical and social dimensions of disability, but they assume disability is a matter of individual differences and, therefore, that state responsibilities

¹⁵⁹ Bassar, above n 152, 190.

¹⁶⁰ There are six national standards applying to disability service providers, which are endorsed by the Select Council on Disability Reform on 18 December 2013. The national standards include rights, participation and inclusion, individual outcomes, feedback and complaints, service access and service management. See Department of Social Services, *National Standards for Disability Services* (30 June 2015) <https://www.dss.gov.au/sites/default/files/documents/06_2015/nsds_full_version.pdf>.

¹⁶¹ *Disability Services Act 1991* (ACT), *Disability Inclusion Act 2014* (NSW), *Disability Services Act 2004* (NT), *Disability Services Act 2006* (Qld), *Disability Services Act 1993* (SA), *Disability Services Act 2011* (Tas), *Disability Act 2006* (Vic), *Disability Services Act 1993* (WA).

¹⁶² See Christopher Newell, 'The Disability Rights Movement in Australia: A Note from the Trenches' (1996) 11(3) *Disability & Society* 429.

¹⁶³ See, eg, Graeme Innes, 'I have never accepted the concept of lifters and leaners', *The Guardian* (online), 2 July 2014 <<https://www.theguardian.com/commentisfree/2014/jul/02/graeme-innes-i-have-never-accepted-the-concept-of-lifters-and-leaners>>.

¹⁶⁴ See Ron McCallum, 'The Convention on the Rights of Persons with Disabilities and its Monitoring Committee: A Domestic and International Analysis' (Paper presented at the Disability, Human Rights and Social Equity Conference, University of Melbourne, 05 February 2015) <https://www.youtube.com/watch?v=QR1_K05Hebw>.

¹⁶⁵ See Section III(A) of Chapter Three.

towards people with disabilities are restricted to the extent of the social, economic and physical barriers that cause functional incapacity. The moral basis for disability services is benevolence and compassion from the state, not the full recognition of the humanity and the rights of people with disabilities.

D *Public inquiries and the Disabilities Convention*

Despite achievements, there are several areas where the Australian government has failed to comply with its obligations under the *Convention*. Following ratification, various Commonwealth oversight institutions examined many areas of law and practices that might contravene *Convention* norms. These inquiries covered the areas of the treatment of disability in migration,¹⁶⁶ involuntary or coerced sterilisation of people with disabilities,¹⁶⁷ access to justice in the criminal justice system,¹⁶⁸ equal recognition before the law and legal capacity of people with disabilities,¹⁶⁹ care and management of Australians living with dementia and symptoms of dementia,¹⁷⁰ prevalence of different types of speech, language and communication disorders and speech pathology services,¹⁷¹ adequacy of existing residential care arrangements available for young people with severe physical, mental or intellectual disabilities,¹⁷² and violence, abuse and neglect against people with disability.¹⁷³

All these inquiries revealed major inconsistencies between Australian law and practice and the *Disabilities Convention*, and exposed cases where the rights of people with

¹⁶⁶ Parliament of the Commonwealth of Australia, Joint Standing Committee on Migration, *Enabling Australia: Inquiry into the Migration Treatment of Disability* (2010) ('*Enabling Australia*' Inquiry Report).

¹⁶⁷ Senate, Community Affairs Reference Committee, *The Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (2013).

¹⁶⁸ Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (2014).

¹⁶⁹ Australian Law Reform Commission, *Equality Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

¹⁷⁰ Senate, Community Affairs Reference Committee, *Care and Management of Younger and Older Australians Living with Dementia and Behavioural and Psychiatric Symptoms of Dementia (BPSD)* (2014).

¹⁷¹ Senate, Community Affairs Reference Committee, *Prevalence of Different Types of Speech, Language and Communication Disorders and Speech Pathology Services in Australia* (2014).

¹⁷² Senate, Community Affairs Reference Committee, *Inquiry into Adequacy of Existing Residential Care Arrangements Available for Young People with Severe Physical, Mental or Intellectual Disabilities* (2014).

¹⁷³ Senate, Community Affairs Reference Committee, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (2015).

disabilities have been seriously violated. For example, a 2015 inquiry of the Senate Community Affairs Reference Committee (SCARC) found that violence, abuse and neglect of people with disabilities are ‘both widespread and takes many forms,’¹⁷⁴ and called for a Royal Commission inquiry into the issue.¹⁷⁵ Many of these concerns were brought to the attention of the UN human rights bodies. For example, the continued practice of involuntary and coerced sterilisation of girls and women with disabilities was condemned by the CEDAW Committee in 2010,¹⁷⁶ the CRC Committee in 2012,¹⁷⁷ the CRPD Committee in 2013¹⁷⁸ and the Committee against Torture in 2014.¹⁷⁹ On this issue, the Human Rights Council (HRC) also condemned Australia in 2011 and 2016.¹⁸⁰ However, successive Australian governments have failed to implement any of these recommendations.

The following section discusses one of these inquiries, an inquiry into the treatment of disability in migration, which was undertaken in response to the JSCOT inquiry on the implication of the *Disabilities Convention* on Australia.

1 ‘Enabling Australia’ Inquiry

Migration is an area of law where Australian governments consistently resist making changes, regardless of their political party allegiance.¹⁸¹ In accordance with the *Migration Act 1958* (Cth) (*Migration Act*), temporary and permanent migrants entering

¹⁷⁴ Ibid xxvi.

¹⁷⁵ Ibid xv. A Royal Commission is the highest form of inquiry established by the Governor-General of Australia to look into matters of substantial public importance. In due course of the inquiry, a Royal Commission functions independently from the government and exercises broad powers, especially in relation to gathering information. The *Royal Commission Act 1902* (Cth) governs the issues relating to the establishment, jurisdiction, membership, coercive powers, and privilege and immunities of such Commission. For a detailed information about a Royal Commission, see Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Report No 111 (2009).

¹⁷⁶ Committee on the Elimination of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc CEDAW/C/AUS/CO/7 (30 July 2010) paras 45-6.

¹⁷⁷ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Australia*, UN Doc CRC/C/AUS/CO/4 (28 August 2012) paras 46(b), 47(b), 57, 58(f).

¹⁷⁸ CRPD *Concluding Observations on Australia 2013*, above n 56, paras 39, 40.

¹⁷⁹ Committee against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, UN Doc CAT/C/AUS/4-5 (23 December 2014) para 20.

¹⁸⁰ Human Rights Council, *Report on the Working Group of the Universal Periodic Review: Australia*, UN Doc A/HRC/17/10 (24 March 2011) para 86(39); *UPR Working Group Report on Australia 2016* paras 87, 136[122], 136[180-182], 136[184].

¹⁸¹ See, eg, Annemarie Devereux, *Australia and the Birth of the International Bill of Human Rights 1946-1966* (Federation Press, 2005) 236.

Australia have to meet some health requirements in order to be eligible for certain visa classes.¹⁸² These requirements are set to minimise the burden of planned migration on the Australian health care system, to prevent the spread of infectious diseases and to protect its record of good health.¹⁸³ In deciding on the grant of visa, the Commonwealth Medical Officer considers the future costs associated with the health conditions of an applicant, assessing the applicant against a certain threshold of cost to Australian public health services. Regardless of the actual use of the services, the assumed cost is a mandatory consideration in the visa assessment and, therefore, such requirements expose some applicants, especially those with disabilities, to the risk that their entry into Australia will be refused. At the same time, the *Migration Act* and the *Migration Regulations 1994*¹⁸⁴ are exempted from the *DDA* application.¹⁸⁵

As mentioned in the previous section, in considering the *Convention*'s ratification, JSCOT recommended the executive government review the relevant provisions of the *Migration Act* and the administrative implementation of migration policy to ensure that 'there is no direct or indirect discrimination against people with disabilities in contravention of the *Convention*.'¹⁸⁶ Consequently, the Minister for Immigration and Citizenship referred an inquiry to the Joint Standing Committee on Migration (JSCM) in August 2009. On 13 August 2009, the JSCM launched the inquiry and tabled its final report to the Parliament on 21 June 2010.

Before discussing the findings and outcomes of the 'Enabling Australia' inquiry, it should be noted that the issue had previously been subject to official scrutiny. The Productivity Commission reviewed the implementation of the *DDA* and the *Disability Discrimination Regulations 1996* (Cth) in 2002 and noted that Australian immigration policies are 'by nature and design, discriminatory and some of the visa entry categories may indirectly discriminate against some people with disabilities.'¹⁸⁷ The report concluded that such discrimination was nonetheless appropriate as these criteria are necessary for the health and welfare of the Australian community. At the same time, the

¹⁸² *Migration Act 1958* (Cth) s 60.

¹⁸³ 'Enabling Australia' Inquiry Report, above n 166, [2.6].

¹⁸⁴ *Migration Regulations 1994* (Cth).

¹⁸⁵ *DDA* s 52.

¹⁸⁶ JSCOT Report No 95, above n 58, recommendation 2.

¹⁸⁷ Productivity Commission, *Review of the Disability Discrimination Act 1992*, Report No 30 (2004) 348.

Commission observed that the current scope of the health requirements might be wider than necessary.¹⁸⁸ Moreover, the discriminatory nature of Australian immigration policy occasionally attracts public attention, especially when significant cases come up. The cases, involving Mr Shahraz Kayani,¹⁸⁹ Dr Bernhard Moeller¹⁹⁰ and baby Gammy¹⁹¹ are well-known examples, some of which were reported to the CRPD Committee.

Regarding the migration health requirement, the Australian government maintains a position that such rule is not discriminatory to people with disabilities as ‘it applies to everyone and is not concerned with the disability itself, but with impacts on the Australian community.’¹⁹² On ratifying the *Disabilities Convention*, Australia made an interpretative declaration addressed to the issue.¹⁹³ Civil society actors question the credibility of the interpretative declaration. For example, the National Ethnic Disability Alliance (NEDA) writes that ‘[i]t remains unclear why a strongly worded declaration was needed if it were indeed the case that Australia’s health requirement would not constitute discrimination under international law.’¹⁹⁴

On the basis of the inquiry, which encompassed a number of public hearings in Canberra, Sydney, Brisbane and Melbourne and received 113 submissions, the JSCM

¹⁸⁸ Ibid.

¹⁸⁹ See, eg, Peter Mares, *Borderline: Australia’s Response to Refugees and Asylum Seekers in the Wake of the Tempa* (UNSW Press, 2002) 19-20. In 2001, Mr Shahraz Kayani, an Australian citizen of Pakistani origin, set himself in fire in front of Parliament House and died as a result. Since 1995, after being granted refugee status, Mr Kayani had tried to reunite with his family. His efforts over six years failed, mainly because his daughter with a disability was considered to be ‘too much of a drain on the health system’ with a lifetime cost estimated to be around \$750 000.

¹⁹⁰ See, eg, Marika Dobbin, ‘Doctor denied visa as son has Down syndrome’, *The Sydney Morning Herald* (online), 31 October 2008 <<http://www.smh.com.au/news/national/doctor-denied-visa-as-son-has-down-syndrome/2008/10/31/1224956298223.html>>. Dr Bernhard Moeller is a migrant doctor from Germany, whose application for permanent residency in Australia was refused twice because of his son with Down’s syndrome.

¹⁹¹ Disability Representative, Advocacy, Legal and Human Rights Organisations, *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities* (2012) [322] (footnotes omitted).

¹⁹² Attorney-General’s Department (Cth), *National Interest Analysis on United Nations Convention on the Rights of Persons with Disabilities* (ATNIA 18, Tabled on 4 June 2008) [15]. See also, Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities: Initial Report Submitted by Australia under article 35 of the Convention*, UN Doc CRPD/C/AUS/1 (7 June 2012) [106-7].

¹⁹³ The interpretative declaration reads as ‘Australia further declares its understanding that the *Convention* does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia’s health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.’

¹⁹⁴ National Ethnic Disability Alliance, *Refugees and Migrant with Disability and the United Nations Convention on the Rights of Persons with Disabilities* (2008) 14.

concluded that ‘the current health requirement reflects the old-fashioned approaches to disability in particular and so unfairly discriminates against those who have disability.’¹⁹⁵ Further noting that the migration regulations ‘explicitly assume disability, or conditions associated with a disability, to be a cost burden to the wider community,’¹⁹⁶ the Committee determined that such outmoded approach ‘should be replaced with a more modern form of a health requirement which has scope to positively recognise individual or overall family contributions to Australia.’¹⁹⁷

The JSCM made 18 recommendations.¹⁹⁸ Senators Sue Boyce and Sarah Hanson-Young made two additional recommendations, which called for the removal of the exemption of the *Migration Act* from the *DDA* and, in the event that this recommendation is not accepted, the development of protocols to address a discriminatory practice of rejecting temporary visa holders as permanent visa holders solely on the basis of the birth of a child with disability.¹⁹⁹ In November 2012, the Gillard government responded to the inquiry.²⁰⁰ In a nutshell, the government accepted eight recommendations of the JSCM, supported five in principle and partially addressed one. But six recommendations, including the two recommendations of Senators Boyce and Hansen-Young, were rejected.

As a result of the inquiry, a significant cost threshold, which has been AU \$21 000 since 2000, was increased to AU \$35 000 from 1 July 2012.²⁰¹ It can be said that this was the most substantive outcome of the inquiry. As of July 2016, the threshold has been AU \$40 000.²⁰² However, the threshold increase appears to have little meaning in practice. For instance, a migration consultant George Lombard said:

¹⁹⁵ ‘*Enabling Australia*’ *Inquiry Report*, above n 166, x [1.3].

¹⁹⁶ *Ibid* x [1.4].

¹⁹⁷ *Ibid* xi [1.6].

¹⁹⁸ *Ibid* xxii-xv.

¹⁹⁹ *Ibid* 202.

²⁰⁰ Australian Government, *Australian Government response to the Joint Standing Committee on Migration report: Enabling Australia Inquiry into the Migration Treatment of Disability* (November 2012)

<<https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/joint-standing-comm-enabling-australia.pdf>>.

²⁰¹ *Ibid* 4.

²⁰² Department of Immigration and Border Protection, *Significant health care and community service cost* <<https://www.border.gov.au/Trav/Visa/Heal/overview-of-the-health-requirement/significant-costs-and-services-in-short-supply>>.

No one with Down syndrome could ever meet that criteria, it's impossible. The costs associated with Down syndrome run far, far higher. A million dollars over a lifetime! These laws are used to turn down migrants with Down syndrome all the time. And not just Down syndrome, other disabilities too.²⁰³

The government responded to the inquiry by stating that it will study the possibility of introducing the 'net benefit approach' that would allow decision-makers to consider the likely social and economic contributions of prospective migrants and their families to Australia as compared to the estimated health care costs.²⁰⁴ While the introduction of a 'net benefit approach' could be an important step forward to rectify the discriminatory health test, no progress has been made to this regard as of July 2016. To this regard, the NEDA urged the government to ensure the practicality of such a measure as social contributions of migrants could not be determined by economic terms.²⁰⁵

IV CONCLUSION

By reviewing legal and policy development, this Chapter provided an instrumentalist story of Australia's implementation of the *Disabilities Convention*. Looking from a distance, Australian disability laws and policies appear to have experienced a wave of change. When scrutinising the key examples of such changes, however, a mixed picture emerges. On one hand, Australian governments deserve a celebration for their responses to the *Convention*. Soon after ratifying the *Convention*, Australia adopted its first national policy concerning people with disabilities. Described as a tool to implement the *Disabilities Convention* in Australia, the *NDS* unambiguously embraces human rights principles. The *NDS* resulted in the *NDIS*, a significant reform that is expected to fundamentally transform the lives of thousands of Australians with severe and profound disabilities. Texts of the newly adopted law and policies suggest that the *Convention* not only triggered legal and policy reforms at the Commonwealth laws and policies, but it has also been implemented in the States laws.

²⁰³ Marnie O'Neil, 'Baby Gammy is not the only one: The ugly law shaming Australia', *The news.com.au* (online), 12 August 2014 <<http://www.news.com.au/lifestyle/real-life/baby-gammy-isnt-the-only-one-the-ugly-law-shaming-australia/news-story/02b91be7758e5090c03e50910a7391c6>>.

²⁰⁴ Australian Government, *Australian Government response to the Joint Standing Committee on Migration report: Enabling Australia Inquiry into the Migration Treatment of Disability* (November 2012) 6.

²⁰⁵ See, eg, National Ethnic Disability Alliance, *NEDA Feedback on DIAC Proposed Changes to Health Requirement* (2013) <<http://www.neda.org.au/index.php/latest/97-neda-feedback-on-diac-proposed-changes-to-health-requirement-joint-standing-committee-on-migration-jscm-migration-report?showall=1&limitstart=>>.

On the other hand, Australian governments failed to change its domestic laws and policies contravening its obligations under the *Convention*. International and domestic authorities have undertaken inquiries into many important areas of disability laws and revealed major inconsistencies between the *Convention* norms and those laws. In the case of ‘Enabling Australia’ inquiry, for example, the Gillard government failed to make a substantive change, despite its outspoken commitment to disability reforms. Yet, the ‘Enabling Australia’ inquiry was the only inquiry that the Commonwealth government has formally responded as of October 2016. Importantly also, contrary to the claim of the Australian government about the compliance of its domestic laws with the *Convention*, the underlying philosophy of Australian disability service laws does not align with the human rights approach to disability. Under these laws, the provision of disability services is not seen as a human right that can be legitimately claimed from the state, but rather it is considered as a consumer right, which an ordinary legislative process can alter. Despite criticisms by few disability rights experts and the CRPD Committee, this philosophical difference between international and domestic laws of Australia neither understood properly, nor discussed widely.

CHAPTER SEVEN

THE *DISABILITIES CONVENTION* IN AUSTRALIA: A CONTEXTUAL STORY

I INTRODUCTION

From the beginning, this research tracing the impact that the *Disabilities Convention* produced in Australia appeared to be a complex task. On the International Human Rights Day in 2013, former chair of the CRPD Committee, Ron McCallum, happened to give a lecture in Canberra. At the event, I asked what he might identify as the most important impact of the *Disabilities Convention* in Australia. With my desk-review based knowledge of recent disability reforms, especially given the fact that the NDIS had started a few months before, I expected an optimistic response. But the response was rather blunt. On one hand, an eminent global expert in the area recognised that the *Convention* has triggered policy reform in Australia. However, Professor McCallum was not prepared to identify the NDS and NDIS as success stories of the *Convention*.

About three months later, we met again at another public event in Melbourne and I raised the same question from a slightly different perspective. I asked whether the NDIS was a direct implementation of the *Disabilities Convention*. Professor McCallum answered that he remembered the exchange we had in Canberra and admitted that he still did not have a straightforward answer to the question. Two months after that conversation, we sat together in his office at the Sydney Law School and had a long, sobering discussion about the *Convention* and its impact in Australia and beyond. Similarly, Graeme Innes, then Disability Discrimination Commissioner of the AHRC and another global expert, was not able to give a direct answer to the question. He said ‘we could have the NDIS without the *DisCo*, but my sense is that the *DisCo* has contributed.’¹ As this research unfolded, I uncovered some of the reasons why these experts did not have a direct answer to such a seemingly straightforward question. This Chapter discusses the outcomes of my fieldwork and suggests that the *Disabilities*

¹ Interview with Graeme Innes, Disability Discrimination Commissioner, Australian Human Rights Commission (Sydney, 20 March 2014, updated via telephone on 25 July 2016). The office term of Mr Innes as Disability Discrimination Commissioner was ended in July 2014. At our second telephone interview, Mr Innes was a chair of the Attitude Foundation, a non-for-profit institution that promotes social inclusion of people with disabilities. Mr. Innes calls the *Disabilities Convention* ‘*DisCo*,’ indicating that people with disabilities should be able to take part in social events, including going to discotheques.

Convention has affected the fabric of Australian society in profoundly complex and diffused ways.

The Chapter consists of three main parts. The previous chapter gives an impression that Australia's ratification of the *Disabilities Convention* resulted in the NDIS. However, a different perspective emerges from local stories and the interviews that I undertook with local actors. Part II shows that, while creation of the NDIS may not relate to Australia's commitment to international law, the *Disabilities Convention* influenced to a political condition to achieve this reform. In doing so, Part II highlights some intriguing dynamics of the NDIS's politics and explores the presence of rights language and rights culture. Many other areas of Australian laws and policies have been affected by the *Disabilities Convention* presumably in different ways, but I focused on the NDIS since it is an emblematic case of the Australian recent disability reforms. Part III discusses the extra-legal impacts of the *Convention*, highlighting its power to galvanise local actors. Here, I claim that, by galvanising actors, the *Convention* started producing cultural impacts in Australia even before its adoption. Part IV, which identifies recent changes to Australian government and civil society institutions, discusses several ways that, as Gerard Goggin describes, 'incredibly useful enunciations of the *Convention*'² were being applied in policy-making and disability advocacy.

II 'AN IDEA WHOSE TIME HAS COME': A CONTEXTUAL STORY OF THE NDIS

During the 2007 federal election campaign, the Labor Party made a commitment to reform disability services. Drawing on the findings of the Senate Inquiry into the Commonwealth and State/Territory Disability Agreement,³ the Labor election platform proposed several measures, including supporting social and economic participation of people with disabilities and their carers, concluding a new form of inter-governmental

² Interview with Gerard Goggin, Professor Department of Media and Communications, University of Sydney (Sydney, 18 March 2014).

³ Senate, Standing Committee on Community Affairs, *Funding and Operation of the Commonwealth State/Territory Disability Agreement* (2007) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2004-07/cstda/report/index>.

agreement on the provision of disability services and developing a national disability policy.⁴ The platform asserted:

Over the last 11 years, the Howard Government has stepped away from a national leadership role in disability policy. The *National Disability Strategy* will replace the Howard Government's failed *Commonwealth Disability Strategy*.⁵

In December 2007, the Rudd Labor government was formed. When Australia ratified the *Convention* in July 2008, political commitment for disability policy reform was already present. From the perspective of local actors, the *Convention*'s ratification was a part of the government's commitment to reform disability policies.⁶

According to Mike Steketee, the idea of the NDIS originated in the inquiry into a national accident compensation and rehabilitation scheme commissioned by the Whitlam government in 1974.⁷ At the *Australia 2020 Summit*, organised in April 2008, the forty-year-old idea came up for a renewed public debate. A submission, co-authored by Bruce Bonyhady, a former Treasury official, an expert in funds management and insurance and the father of two sons with cerebral palsy, and by Helen Sykes, recommended to the Summit that:

The time is right to reform the disability sector: to shift from the current crisis-driven welfare system to a planned and fully-funded National Disability Insurance Scheme that will underwrite sustained, significant long-

⁴ Shadow Minister for Ageing, Disabilities and Carers, Senator Jan McLucas 'Disability and carer: Election 2007' (2007)

<http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/O9VO6/upload_binary/o9vo63.pdf;fileType=application%2Fpdf#search=%22library/partypol/O9VO6%22>.

⁵ Ibid 6.

⁶ See, eg, Australian Government, 'Developing a National Disability Strategy for Australia: Access, Inclusion and Participation' (Discussion paper for consultation, October 2008) 4

<https://www.dss.gov.au/sites/default/files/documents/06_2012/nds_paper.pdf>. The discussion paper states that:

The government's recent ratification of the United Nations Convention on the Rights of Persons with Disabilities reflects the government's commitment to the rights of people with disability. The National Disability Strategy will be an important mechanism to ensure that the principles underpinning the Convention are incorporated into policies and programs affecting people with disability, their families and carers.

⁷ Mike Steketee, 'How a Forty-year-old Proposal Became a Movement for Change,' *Inside Story* (online), 22 October 2013 <<http://inside.org.au/national-disability-insurance-scheme/>>.

term improvements in meeting the needs of people with disabilities and their families.⁸

The recommendation was adopted as one of the big ideas of the Summit.⁹ However, as Bonyhady said, the actual catalyst of the idea was Brian Howe, the longest serving Minister in the Hawke-Keating governments, who introduced the *DDA* and initiated the first *Commonwealth and State/Territory disability agreement* in the 1990s.¹⁰ Howe, as a board member of the Disability Housing Trust, contacted Bonyhady and said ‘you should stop thinking about disability as welfare and start thinking about it as a risk and insurance.’ Bonyhady recalled ‘I thought, he’s right and that got me going.’¹¹

In achieving a major reform like the NDIS in Australia, having a felicitous idea and a committed government may not be enough. To become a reality, the proposal has to survive confrontational domestic politics involving two levels of government. For the NDIS, it was not so much government support that needed to be stimulated, but mostly, awareness and support from a broad spectrum of politicians from both sides as well as from government bureaucrats was needed. Meticulous policy development, shrewd political moves and successful public mobilisation were the immediate key ingredients that delivered the NDIS. Understanding these aspects of the NDIS illuminates Australian human rights politics. The following sections will discuss these elements.

A *Canberra politics*

Soon after the 2020 Summit, Bill Shorten MP, as Parliamentary Secretary for Disabilities, established the Disability Investment Group (DIG) to explore innovative funding ideas from the private sector for the proposed NDIS and appointed Bruce Bonyhady as one of seven experts in the Group.¹² In September 2009, DIG released its report. The ‘*Way Forward*’ report predicted that, over the next 40 years in Australia, the

⁸ Bruce Bonyhady, ‘Adequate Support for People with a Disability’ (2009) *Perspective* 145 citing Bruce Bonyhady and Helen Sykes’s submission.

⁹ Department of the Prime Minister and Cabinet, *Australia 2020 Summit: Final Report* (Commonwealth of Australia, 2008) 173. The Final Summit Report recommended the government to ‘establish a National Disability Insurance Scheme, similar to a superannuation scheme, to support the families of children with brain injury from birth and other non-insurable injuries.’

¹⁰ Bonyhady, quoted in Steketee, above n 7.

¹¹ Ibid.

¹² See Department of Social Services, *Disability Investment Group* (7 November 2014)

<<https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-people-with-disability/disability-investment-group>>.

number of people with severe or profound disability would grow from 1.4 million to 2.9 million, indicating a growth in demand for specialist disability services of 7.5 per cent per annum.¹³ PricewaterhouseCoopers worked with DIG to consider the costs, benefits and governance of the NDIS.¹⁴ On the basis of initial assessments, the DIG recommended, along with other issues, a feasibility study into the NDIS proposal.¹⁵

Following the recommendation, in February 2010, the government requested the Productivity Commission to propose a feasibility study of the NDIS. ‘When the Productivity Commission released the inquiry report in July 2011, it became an incremental step forward for the NDIS’ said Minister Jenny Macklin.¹⁶ The report estimated that funding for disability services would need to double from AU \$6.2 billion spent in 2009-10, requiring about AU \$13 billion each year for a fully operating scheme.¹⁷

Given that the Gillard government was also committed to public school funding reform, requiring another several billion dollars of investment, the estimated cost of the NDIS was certainly not a figure that politicians from both sides would easily agree upon. The Productivity Commission provided an analysis of the inefficient current model and a potential solution to the system, but it did not identify how the scheme should be financed, suggesting only that the funding could come from general revenue. Getting agreement to the NDIS by the States and Territories, which were required to invest more in disability service, and arranging the Commonwealth’s share of funding, proved to be a tough political battle for the Gillard minority government.

Prime Minister Julia Gillard reflected on the politics of the NDIS in her memoir.¹⁸ As the NDIS launch was announced on 30 April 2012, in the 2012 budget, the government committed AU \$1 billion to the launch of the NDIS in a limited number of sites. This

¹³ See Commonwealth of Australia, *The Way Forward: A New Disability Policy Framework for Australia* (Disability Investment Group, 2009).

¹⁴ PricewaterhouseCoopers, *Disability Investment Group: National Disability Insurance Scheme — Final Report* (Canberra, 2009).

¹⁵ The report makes six recommendations. Other recommendations include establishing special disability trusts, enabling savings and investment incentives private investments in housing, promoting better employment opportunities and building best practices and research.

¹⁶ Macklin, quoted in Steketee, above n 7.

¹⁷ See Productivity Commission, *Disability Care and Support*, Report No 54, Vol I (2011) 34.

¹⁸ Julia Gillard, *My Story* (Knopf, 2014).

step added a momentum to the negotiation with State and Territory governments on the full rollout of the scheme. Gillard writes:

...[m]y COAG experience had proven the adage that work expands to fill the time available. Create a deadline and the system can move quickly. Apart from a deadline, a great motivator is competition. Specifying that there were a limited number of launch sites was meant to spark some competitive tension about who would get a launch site and who would miss out.¹⁹

At the COAG meeting on 25 July 2012 the site agreements needed to be settled. The Labor States of South Australia and Tasmania agreed to launch arrangements for children and teenagers and the ACT Labor leaders agreed to a geographical launch site. But the politics with States with Liberal and the Coalition governments were gridlocked. Two such states, NSW and Victoria, refused to meet the financial benchmarks outlined for participating in a launch site. ‘Unless we could secure a trial in major geographical site, and with the participation of one of the bigger states, the NDIS could be viewed both politically and organisationally as a failure,’ writes Gillard.²⁰ As the COAG meeting got stuck, the Prime Minister invited Premiers of the two States, Barry O’Farrell and Ted Baillieu, for a discussion and ‘outlined the deal again and gave the analysis of politics.’²¹ Going through protracted negotiations with the two State governments, the Commonwealth reached agreement with NSW on 6 December 2012. The former Prime Minister writes, ‘[e]veryone knew that the most populous state in the nation signing on [to the NDIS] meant the only way this was going to end was with everyone signing on.’²²

Although an agreement was reached between the Commonwealth and the States, organising funding for the NDIS was another challenge. Initially, the Gillard government planned to fund the Commonwealth government’s share of the NDIS funding through savings in other policy areas. The former Prime Minister writes that:

¹⁹ Ibid 419-20.

²⁰ Ibid 420.

²¹ Ibid 421. Gillard describes the meeting atmosphere as:

From Barry’s eyes, I sensed he got the political problem coming his way. If he did not sign up for a launch site that day, he would be publically positioned as heartless in the face of the needs with people with disabilities. Ted could not read the politics; he was obsessed by the detail. He kept bringing me back a diagram he had drawn about aspects of the funding.

²² Ibid 421-22.

Although it would be painful and hard, I thought it was doable. I also wanted to avoid the political liability that would come from advocating another tax. The government was already in the most bloody of fights about what was generally referred to as the carbon tax and the mineral resources rent tax. I imagined a new tax for disability would become the next frontier for the Opposition's hard campaigning.²³

To cover the initial phase of the scheme, Minister Jenny Macklin appeared before the Expenditure Review Committee (the ERC), asking for AU \$14 billion over five years. 'It certainly was the hardest thing I ever had to take to the ERC,' said Macklin.²⁴ However, as revenue continued to decrease, it became apparent that the government could not fund the NDIS in the long term without a new revenue source. After much discussion, an increase in the Medicare levy was determined to be a way to move forward for the NDIS. Not surprisingly, such a proposal encountered fierce objection from the Tony Abbott-led Opposition. Although the Opposition declared itself to be bipartisan about creating the NDIS, the way to fund the scheme became subject to a deeply partisan debate.²⁵ The *NDIS Act* was adopted in March 2013, but the funding issue was not resolved until May 2013.

The agreement on the Medicare levy increase nonetheless came unexpectedly. On 1 May 2013, in relation to the 2013 federal budget discussion, the Opposition Leader challenged the Prime Minister to bring the legislation to the Parliament.²⁶ In return, the government put a condition to the Opposition to support the proposed increase in the Medicare levy. The following day, the Opposition leader offered a conditional support on the basis that the levy increase would be removed once the budget was back into strong surplus, which, as Gillard noted was, 'a small political twist to complete the argument with me, while preserving his argument about the Labor and taxes.'²⁷ Finally, an agreement was made to increase the Medicare levy to help pay for the NDIS.

Another vital ingredient in making the NDIS was the 'Every Australian counts' campaign — a successful community mobilisation for the reform. Gillard writes:

²³ Ibid 424.

²⁴ Macklin, quoted in Steketee, above n 7.

²⁵ Gillard, above n 18, 424.

²⁶ *Medicare Levy Amendment (DisabilityCare Australia) Bill 2013* (Cth).

²⁷ Gillard, above n 18, 424.

Now having fired the starting pistol and mustered the determination to win through in the hard world of commonwealth-state negotiations, to guard against potential failure we needed momentum for change from the community. State leaders had to feel political skin was at risk. The vital final ingredient that made the NDIS possible was the new professionalism of the disability sector in its approach to campaigning.²⁸

The following section discusses the campaign processes.

B *Community mobilisation*

The ‘Every Australian counts’ campaign was not a type of civil society mobilisation that human rights scholarship commonly envisions — the confrontation of oppressed groups asserting rights against a reluctant government. Rather, the campaign was initiated and supported by the Gillard government to get over contested domestic politics. While the idea of NDIS was being crystallised in the government, Parliamentary Secretary for Disability, Bill Shorten, started to mobilise public support for the reform. Regarding Shorten’s engagement in the campaign, Gillard writes:

What Bill Shorten understood was the high degree of power the sector could wield if it came together and really flexed its campaign muscle and he had spoken frankly to the sector about this, galvanising it.²⁹

Bringing together the key constituencies of a sector that was fundamentally divided by their interests was not straightforward for Shorten.³⁰ ‘[Shorten] couldn’t believe how totally fragmented the sector was’ says Bonyhady.³¹ But, as David Marr describes, ‘Shorten used the argument that he had often drawn on as union official and one that has been a theme in his approach to politics.’³² ‘We can spend all the time arguing about what we don’t agree on or we can focus on the 90 per cent that we do agree on and get things done,’ argued Shorten to persuade the sector constituencies.³³ Rhonda Galbally, chair of the NPDCC, the advisory body to the NDS, suggested forming a single group out of the sector to encourage community support.³⁴ Although her suggestion was not taken up immediately, eventually the National Disability and Carer Alliance (NDCA)

²⁸ Gillard, above n 18, 420.

²⁹ Ibid.

³⁰ Steketee, above n 7.

³¹ Bonyhady, quoted in Steketee, *ibid.*

³² ABC Radio National, ‘Bill Shorten: A man who would be the PM’, Big Ideas, 12 October 2015 (Paul Barclay) <<http://www.abc.net.au/radionational/programs/bigideas/bill-shorten—the-man-who-would-be-pm/6834628>>.

³³ Steketee, above n 7.

³⁴ Ibid.

was formed, bringing together the Australian Federation of Disability Organisations, the Carers Australia and the National Disability Services.

NPDCC and NDCA worked hand-in-hand for the NDIS; the former focused on the policy drafting that would lead to the NDIS and the latter organised the community campaign. The deputy chair of the NPDCC and the primary author of the '*Shut Out*' report, Kirsten Deane, simultaneously served as an executive director of the NDCA, organising the 'Every Australian counts' campaign. In the early days, former Labor Disability Minister of NSW and an experienced campaign manager, John Della Bosca, offered his assistance to the NDCA. The campaign started from conventional means of public mobilisation such as distributing handouts at public places and organising community morning teas known as DisabiliTEAs. Gradually, campaigners used more innovative ways, partly because of the funding limitations. For example, they extensively used social media as a tool for people to tell their stories and describe the problems they encountered and how an NDIS would make a difference in their lives.³⁵ 'Once things started being posted online, others felt empowered to do the same thing and it became a self-fulfilling thing,' Della Bosca said.³⁶

According to Della Bosca, the most effective strategy that they used was the direct engagement of people with disabilities with their local politicians.³⁷ NDCA organised and encouraged meetings of people with disabilities with local MPs. The meetings were deliberately designed to be positive, instead of the conventional complaining ones.³⁸ As Kirsten Deane describes, at the meetings people told their local members about the difference an NDIS would make to their lives, often finishing with a line like 'I need you to be my champion in the Parliament.'³⁹ MPs were asked to sign a pledge that reads:

You can count me in. I support a fair go for people with disability and their families. That's why I am a champion of the 'Every Australian Counts' campaign for the NDIS.⁴⁰

³⁵ Della Bosca, quoted in Steketee, above n 7.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

People took a photo with MPs holding their signed pledge and posted it on social media platforms. In her memoir, Gillard describes one such event:

The campaign, assisted by Jenny [Macklin], organised photo opportunities with political leaders and children with disabilities. Premiers and chief ministers participated in one such opportunity on the way into a COAG meeting. Inside, Victorian Premier Ted Baillieu remarked to me such events only increased expectations. I thought ‘Exactly. That is why we are going to keep corralling you into them.’⁴¹

During the campaign, at least 80 per cent of 150 lower house MPs of the Commonwealth Parliament received visits from people with disabilities.⁴² In total, 154 654 people signed up to the campaign.⁴³ Overwhelming political support was received from both political wings and the NDIS was referred as an issue that was ‘above politics.’ Some commentators also noted negative implications of the mounting public support for the NDIS. For example, Andrew Baker writes that:

The broad public and cross-party political support for the NDIS has ensured the scheme has not received the scrutiny it deserves. The NDIS will be a monster of a government program—the new leviathan of the Australian welfare state.⁴⁴

Jenny Macklin describes the political momentum built for the NDIS by noting that ‘by the time we proposed the Medicare levy increase, there was so much momentum for the scheme, no one was game not to do it.’⁴⁵

C *A missing rights discourse*

The *NDIS Act* embraces the *Disabilities Convention*. By enabling people with disabilities to control the supports and services that they need, the NDIS promotes human dignity and autonomy.⁴⁶ Nevertheless, human rights and the *Disabilities Convention* were rarely invoked in social discourse around the NDIS. The two themes

⁴¹ Gillard, above n 18, 420.

⁴² Steketee, above n 7.

⁴³ Senator McLucas, 2144 Senate. 20 March 2013.

⁴⁴ Andrew Baker ‘The New Leviathan: A National Disability Insurance Scheme’ (Centre for Independent Studies, Policy Monograph 131, 2012)

⁴⁵ Macklin quoted in Steketee, above n 7.

⁴⁶ While the expected outcome of the NDIS promotes dignity and rights of people with disability, it is also an insurance scheme, which insures Australians against the risk of having severely disabled. In terms of the *Disabilities Convention*, which seemingly approaches disability as identity, the concept of the NDIS is controversial. See Chapter Ten.

apparently dominating social discourse around the NDIS were: (1) disadvantage of people with disabilities and lack of ‘fair go’ (2) economic benefits of the scheme.

For example, the campaign slogan — ‘Every Australian counts’ — was chosen to respond to the belief of Australians in the idea of a ‘fair go’ by raising the question, ‘we are a country, which says we believe in fairness, but how can it be fair that we treat other Australians like this?’⁴⁷ Considering the fact that ‘disability groups tended to talk to each other rather than to the broader community,’ as Della Bosca explains, the community campaign targeted people without disabilities to persuade them of the need for the reform.⁴⁸ ‘We worked hard to neutralise the disability language and to use the community vernacular,’ said Della Bosca.⁴⁹

The second theme in social discourse concerned the increased social and economic participation of people with disabilities and their carers. Yet, social participation was rarely invoked from the point of human rights; rather, discussion was mostly about economic benefits. This included the potential increase of workforce (about 320 000 people, who would join the workforce or increase their working hours) as a result of improved independence of people with disabilities. The NDIS was also justified on the belief that it would reduce the long-term cost of disability care by improving early intervention and service.

Nonetheless, research participants identified that public discourse around the NDIS helped to promote awareness of the autonomy and independence of people with disabilities, at least in policy circles, and the increased awareness prompted legal and policy changes. The following section will discuss these findings in detail. In the margin of the needs or economic benefits-based discourses of the NDIS, human rights organisations and disability advocates seldom voiced rights-based arguments. The rights-based argument visibly, but briefly, came into public discourse in relation to the name change of the NDIS to Disability Care. On 18 March 2013, while announcing the allocation of additional funding for playgroups at an event celebrating National

⁴⁷ John Della Bosca quoted in Steketee, above n 7.

⁴⁸ Ibid.

⁴⁹ Ibid.

Playgroup Week, Minister for Disability Reform Jenny Macklin announced the name change of the NDIS. The media release stated that:

In another step that this care and support is about to become real for Australians with disability and their families, we now have a name for the NDIS — ‘Disability Care Australia.’ The name has been chosen based on consultation with people with disability, their families and carers, peak organisations and the general public. Disability Care Australia reflects the principles of the NDIS — that all Australians with significant or profound disability receive the care and support that they need, regardless of how they acquired that disability.⁵⁰

The new name and the manner in which it was announced provoked much angst and disappointment in the disability community. Many people expressed their concern that the word ‘care’ implied that the scheme is linked to welfare and paternalism.⁵¹ The late Stella Young, a respected disability rights advocate and comedian, commented that ‘it’s paternalistic, charity-model, carer-centric rubbish that does very little to empower people with disabilities to exercise the choice and control over our lives that the NDIS is intended to give us.’⁵² Young writes:

We are no strangers to terrible names for things in the disability sector. Two years in a row the campaign for the NDIS, Every Australian Counts, has run so-called awareness-raising DisabiliTEA events. Yes, you read that correctly. Disability, but with cups of TEA. Get it? It’s all terribly cute while doing approximately nothing to address the paternalistic attitudes we fight so hard against.⁵³

Despite a thorough Internet search, Young was not able to find an individual or organisation, ‘who was a part of this low-key government consultation and who likes

⁵⁰ Senator Hon Jan McLucas, Minister for Families, Community Services and Indigenous Affairs and Minister for Disability Reform Jenny Macklin MP, and Member for Fraser Andrew Leigh MP ‘Extra funding for playgroups to give kids a better start’ (Joint Media Release, 18 March 2013) <<http://www.formerministers.dss.gov.au/11797/extra-funding-for-playgroups-to-give-kids-a-better-start/>>.

⁵¹ See Commonwealth, *Parliamentary Debates*, Senate, 20 March 2013, 2147 (Mitch Fifield, Shadow Minister for Disability). Senator Fifield quoted the organisations and individuals who made submissions to the Senate. For example, Lesley Hall said, ‘the scheme is not just about caring, it is about supporting people to have to get on and do what they want in life.’ David Heckendorf said ‘Oh, come on guys! Really? Disability Care? Why not go all the way and call it Crip Care? ...It is not about caring. It is about empowering. Can we be little more imaginative?’ Jackie Softly said, ‘I hate the name. But I worry more that the name reflects the way the powers that be see it. Now that it very scary.’ Kelly Vincent, the Dignity for Disability MP in the South Australian Legislative Council said, ‘we are not a scheme for sick people needing care — we are people with disabilities that need to be supported, assisted and enabled. We do not need the NDIS name change to further perpetuate the patronising attitudes.’

⁵² Stella Young, ‘Disability care: a bad name but a good direction,’ *ABC News* (online), 22 March 2013 <<http://www.abc.net.au/news/2013-03-22/young-disabilitycare---what27s-in-a-name/4588198>>.

⁵³ Ibid.

the name.’ She writes, ‘[i]ndeed, the name was heavily criticised in a forum discussing the NDIS. This forum was later removed, but the comments still exist in Google’s cache.’⁵⁴ However, the community outrage seems to have attracted little political attention. During the second reading of the *NDIS Bill*, only one Senator — Senator Mitch Fifield — raised the issue. ‘I want to move to what will probably the least significant issue raised in this Committee,’ Senator Fifield opened his questioning and reminded that ‘the name might not be an accurate reflection of the nature of the scheme.’⁵⁵ The title of Disability Care Australia, which reinforces the message of people with disabilities as objects of care, remained until the Abbott government restored the name to NDIS in February 2014.⁵⁶

D *Individuals, commitment and a momentum*

The disability policy reforms were not primarily the outcomes of the Australian government commitment to the *Disabilities Convention*. Rather, these reforms were achieved mostly as a result of the efforts of a group of committed individuals who harnessed the political momentum to which the *Convention* contributed. In this section, I will briefly discuss the two ingredients that made people be committed to the NDIS and bring about positive changes to the lives of people with disabilities.

First, interest induces commitment. Undertaking disability service reform was in the interest of the Rudd-Gillard-Rudd Labor governments. Moreover, the Labor governments had an interest in identifying Australia as a decent member of the international community, signalling their different attitude to the international human rights regime from the previous Howard Coalition government. The Labor politicians who actively engaged in the NDIS cause were aware of its political purchase. For example, Bill Shorten’s support and engagement in the reform were explained in terms of political interest. Mike Steketee writes that:

For [Bill Shorten, whom Rudd has appointed as Parliamentary secretary for disabilities] who even then saw himself as future prime minister, the

⁵⁴ Ibid.

⁵⁵ Commonwealth, *Parliamentary Debates*, Senate, 20 March 2013, 2145 (Mitch Fifield, Shadow Minister for Disability).

⁵⁶ Senator The Hon Mitch Fifield, ‘NDIS name change’ (Media Release, 5 February 2014) <<http://www.mitchfifield.com/Media/MediaReleasesArchives/tabid/101/ArticleType/ArticleView/ArticleID/738/Default.aspx>>.

portfolio had come as a disappointment. As one colleague put it, ‘Shorten did not really want it but it was all that was left.’ But the appointment turned out to be a happy coincidence between Shorten’s ambition and the needs of people with disabilities.⁵⁷

Most often, the people who significantly contributed in making the NDIS possible had personal interests in the cause. They were either people with disabilities themselves or carers and parents.

Yet, it would be inaccurate to explain commitment solely in terms of interest and gain. The second factor explaining commitment was awareness. As people became aware of the injustice and disadvantage that people with disabilities experience in their daily life, they became committed to the cause and, in triggering the awareness of injustice, reports and evidence were important. For example, Bill Shorten became involved in the NDIS because of his appointment. However, in the course of the process, Shorten, in the words of Gillard, ‘actually fell in love with the policy area.’⁵⁸ He became an outspoken advocate of not only the NDIS, but also broader disability issues. Australian disability activists spoke about a speech by Bill Shorten, ‘The Right to an Ordinary Life,’ which became an inspiration to them.⁵⁹ ‘When high profile people start using the language of the CRPD, it influences other people to be aware of disability issues,’ Gerard Goggin noted.⁶⁰ Also, Steketee writes, ‘it was not a risk-free stand: he was criticising the neglect of both Labor and Liberal governments and he was applying external pressure to the government, of which he was a member.’⁶¹

John Della Bosca too seem to have supported the NDIS, mainly because of the awareness that he developed while serving as a NSW Disability Minister. In a newspaper article, Della Bosca described how the initially disappointing appointment turned to be an enlightening one.⁶² When Della Bosca began serving in the position, he

⁵⁷ Steketee, above n 7.

⁵⁸ Gillard, above n 18, 418.

⁵⁹ Hon Bill Shorten MP ‘The Right to an Ordinary Life’ (Speech given at the National Press Club, Canberra, 1 April 2009) < <http://www.formerministers.dss.gov.au/3220/right-to-an-ordinary-life-national-press-club/>>.

⁶⁰ Interview with Gerard Goggin, Professor Department of Media and Communications, University of Sydney (Sydney, 18 March 2014).

⁶¹ Steketee, above n 7.

⁶² John Della Bosca, ‘The day a penny dropped for me on disability’, *Sydney Morning Herald* (online), 23 March 2011 <<http://www.smh.com.au/opinion/society-and-culture/the-day-the-penny-dropped-for-me-on-disability-20110322-1c4uv.html>>.

was not excited as, in the disability sector, ‘big battles like deinstitutionalisation had been fought and won.’⁶³ However, a meeting with a Central Coast Disability Parents group, which Della Bosca declined twice and had almost forgotten on the day, ‘dropped a penny on disability’ to him. Della Bosca writes:

This man's talk was like a thunderbolt. It was the day I got disability. In the decades post deinstitutionalisation governments and the community had underfunded disability. Not by a little bit but by half. To add insult to injury there was no provision for the inevitable growth in demand, so the available resources got relatively smaller every year. Underfunding to this extent meant everything in the system was rationed. Stories of nine-year-olds being delivered the wheelchair or speech aid suitable for them when they were five were true, commonplace and a result of that rationing.⁶⁴

The combination of many factors made the NDIS possible. It was in fact, as former Prime Minister Tony Abbott once described, ‘an idea whose time has come.’⁶⁵ Among such factors, the processes around the *Disabilities Convention* seems to have been an important factor. Most research participants observed that the *Convention* contributed in creating political momentum for achieving the reform. For example, Lee Ann Bassar noted that:

Disability issues are being increasingly discussed now in Australia. The language around discussion is framed in terms of human rights. I would not say that the ratification alone has caused this. We had domestic need or impetus/appetite for change accumulated for the last 30 years. The *Disabilities Convention* came up and provided a momentum for change. All the good things are added-up and all together they produced change. Whether a change comes from treaty or domestic legislation is in complex relationship. It is difficult to separate from each other.⁶⁶

‘The NDIS to be possible, the *Convention* had an effect. It changed awareness of the government,’ asserted Janine Cootes, ‘I do not think the current Abbott government would have ever chosen to do it, although they say that they support it.’⁶⁷ Stephanie Gotlib from Children and Young People with Disability noted that ‘because of the

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ John Della Bosca ‘The NDIS is an idea whose time has come — Opposition Leader Tony Abbott MP’ (Blogpost, 3 March 2012) <http://everyaustraliancounts-old.com.au/the_ndis_is_an_idea_whose_time_has_come_opposition_leader_tony_abbott/>.

⁶⁶ Interview with Lee Ann Bassar, Reader and Associate Professor, La Trobe Law School (Melbourne, 20 February 2014).

⁶⁷ Interview with Janine Cootes, Executive Officer, Intellectual Disability Rights Service (Sydney, 19 March 2014).

CRPD, disability is on political agenda in Australia now, more than ever.’⁶⁸ Disability activist Frank Hall-Bentick also commented that:

The NDIS is an idea that came in time and the momentum has built up for it. A good thing about such a momentum is that you have ordinary people thinking that they can live better lives and they get involved in it much more actively. The momentum just keeps building up for the NDIS.⁶⁹

III EXTRA-LEGAL EFFECTS OF THE *DISABILITIES CONVENTION* IN AUSTRALIA

A *Drafting of the Disabilities Convention and Australia*

As discussed in Chapter Two, the scholarship commonly assumes that only ratified treaties produce a change in a domestic context. Australian actors indicated however that the *Disabilities Convention* impacted on Australia before its UN adoption.⁷⁰ In the early days of the Ad Hoc Committee, the Howard government showed significant aversion to the idea of creating a human rights treaty on disability and was active among a small number of countries that attempted to prevent the Ad Hoc Committee starting discussion of the treaty’s creation.⁷¹ At the first session, an Australian representative to the UN claimed that the GA *Resolution 58/168* ‘did not authorise the Ad Hoc Committee to develop an international instrument on the rights of persons with disabilities, nor, in particular, did it mandate the development of a particular type of instrument.’⁷² Australia maintained the same position during the second session of the Ad Hoc Committee. In an official statement, the delegation expressed Australia’s support for strengthening the rights of people with disabilities under international law,

⁶⁸ Interview with Stephanie Gotlib, Chief Executive Officer, Children and Young People Australia (Melbourne, 24 February 2014).

⁶⁹ Interview with Frank Hall-Bentick, Board Member, Australian Federation of Disability Organisations (Melbourne, 25 February 2014).

⁷⁰ Interview with Lee Ann Bassar, Reader and Associate Professor, La Trobe Law School (Melbourne, 20 February 2014).

⁷¹ Heidi Forrest and Phillip French, ‘Voices Down Under: An Australian Perspective’ in Marianne Schulze Maya Sabatello (eds), *Human Rights and Disability Advocacy* (University of Pennsylvania Press, 2014) 188, 190.

⁷² Ibid 191. These authors wrote, ‘[the Australian delegation] argued that the Ad Hoc Committee was merely authorised to ‘consider proposals’ for an international convention, and the use of the term ‘convention’ (with a small “c” in the resolution) was not to be understood as limiting the types of instrument that might be considered.’

but suggested that ‘a protocol or annex to one of the existing core human rights treaties would provide more effective protection, rather than a free-standing new convention.’⁷³

Initially, a majority of Australian disability activists did not know of the developments around the *Convention* and the position of their government.⁷⁴ A few DPOs, who were observing the process closely, provoked their peers and initiated dialogues.⁷⁵ Forrest and French describe one such event. In collaboration with the Australian Disability Studies and Research Institute, PwDA organised a seminar in Sydney in order to raise consciousness about the *Convention*’s negotiation and initiate a dialogue between the government and key DPOs about the Australian position towards the *Convention*.⁷⁶

The seminar proved the difficulty of persuading many national representative groups. Some DPOs asserted that ‘domestic issues were the more important focus of attention and that a treaty of this nature would be unlikely to have much impact in Australia.’⁷⁷ Many activists also expressed the view that drafting of a treaty would take many years, if it could be achieved at all.⁷⁸ Nevertheless, the seminar galvanised in some people a sense of responsibility to influence the government to take more positive role in the Ad Hoc Committee ‘not only for the sake of Australians with disability, but also to ensure that Australia did not thwart the potential for a human rights instrument that would benefit persons with disabilities around the globe.’⁷⁹ Soon after the seminar, some DPOs including PwDA applied for the accreditation to take part in the Ad Hoc Committee sessions and started engaging with the government delegation directly.

To their effort to galvanise the Australian DPOs the *GA Resolution 57/229*,⁸⁰ which encouraged the involvement of people with disabilities and their representative organisations in the *Convention*’s drafting, became an incremental step forward. Implementing the resolution, the Australian government attempted to consult with the

⁷³ Statement of Australian Delegation, ‘Second session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, New York, 16-27 June 2003’ (17 June 2003) <<http://www.un.org/esa/socdev/enable/rights/contrib-australia.htm>>.

⁷⁴ Forrest and French, above n 72, 191.

⁷⁵ Ibid.

⁷⁶ Ibid 192.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ *GA Resolution 57/229*.

sector, but, according to Forrest and Phillip, not in a sincere and genuine way.⁸¹ The first consultation was limited to seeking written submissions on the matters in the draft agenda for the meeting. A limited time was given to the peak organisations, giving no opportunity for them to consult their members.⁸² Nor did the letter clearly outline the position being held by the Australian delegation.⁸³ The superficiality of the government approach to the consultation provoked strong criticisms from people with disabilities and contributed to stimulating a positive change in the government approach to consulting with the sector.⁸⁴

With regard to the GA *Resolution 57/229*, Australia also appointed a representative of people with disabilities in the government delegation. The representative was selected from the National Disability Advisory Council of Australia, then official advisory body to the government. But, contrary to what the DPOs feared, ‘a person of considerable talent and integrity who made an important contribution to reshaping the delegation’s approach to the AHC mandate’ was selected.⁸⁵ From the second meeting of the Ad Hoc Committee, the Australian delegation included representatives from the Attorney-General’s Department, the Department of Families, Community Services and Indigenous Affairs, the AHRC and a sector representative.⁸⁶

While there were certain ‘no-fly zones’ between the government delegations and civil society observers during the Ad Hoc Committee, their relationship was generally cooperative and respectful towards each other.⁸⁷ From the beginning, DPO observers agreed to brief the government delegation on their views and provided the text of their interventions prior to any public statement. The government delegations gradually started reciprocating. In a relatively short period, the Australian government changed its position towards the *Disabilities Convention*. Forrest and French write:

Although the Australian Government had not wanted or endorsed the creation of a new human rights instrument for persons with disabilities, it

⁸¹ Forrest and French, above n 71, 193.

⁸² Ibid 194.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid 195.

⁸⁷ Ibid.

eventually decided to embrace this agenda and played an increasingly positive and activist role in the negotiations from the third session forward.⁸⁸

At home, the appointment of Phillip Ruddock as Commonwealth Attorney-General in October 2003 generated support for the *Convention*.⁸⁹ While known for his controversial immigration detention policies as a Minister for Immigration, Attorney-General Ruddock, the father of a disabled child, was sympathetic to and supportive of the *Disabilities Convention*.⁹⁰ Prior to the fourth meeting of the Ad Hoc Committee in June 2004, the Attorney-General provided a significant grant to PwDA and its partner organisations to organise a nationwide consultation on the treaty proposal, which would inform the preparations for negotiations by the delegation.⁹¹

The grant enabled a number of events and discussions about the treaty to take place across the country. These included public consultations, focus group meetings, online fora, the creation of a web-based blog, targeted emailing, and discussion through a national toll-free number.⁹² The consultation produced a comprehensive report, suggesting for the government a structure for the treaty, the proscription of articles and the style of language to be used. ‘Although we never had access to the Australian delegation brief for the third (or any other) session, it was clear ... that this submission was very influential. Indeed, in many areas it appeared that the Australian government had adopted this advice in full,’ write Forrest and French.⁹³ The consultation report was not only useful for the government delegation, but it provided DPOs with a detailed foundation for their lobbying at the Ad Hoc Committee.⁹⁴

The Australian delegation contributed significantly to the *Convention*’s drafting. Rosemary Kayess, who participated in the entire drafting process representing both

⁸⁸ Ibid 196.

⁸⁹ Ibid 197.

⁹⁰ A confidential part of an interview (Sydney, 26 March 2014) [The interviewee consented to disclose his/her identity. As this part of interview involves personal information, the interviewee’s identity was protected. The date and place of the interview may be changed. The interviewee representing Australia took part in the negotiation of the *Disabilities Convention*.]

⁹¹ Commonwealth Attorney-General the Hon Phillip Ruddock MP, ‘A grant to disability sector on consultation on UN Convention’ (112/2004, Media Release, 29 June 2004) <pwd.org.au/documents/project/undrc/ag_media_release.doc>.

⁹² Forrest and French, above n 71, 198.

⁹³ Ibid 199.

⁹⁴ Ibid.

Australian government and civil society organisations in various sessions of the Ad Hoc Committee, said:

On my first participation to the Ad Hoc Committee meeting, I was on an NGO delegation. My expectation was that we would sit in the corner and to be dazzled by those great minds gathered at the Committee. But when we got there, it was the opposite. Many government delegations did not have a clue about disability. Many NGOs did not have a clue about international law. We came as a delegation from the National Association of Community Legal Centres. Here we have a robust antidiscrimination laws and we came from a wealthy country, which has relatively good disability policies by the world standard. We were able to contribute more than we expected. We were able to contribute something significant.⁹⁵

Importantly, the consultation process had a broader social and political impact.⁹⁶ It informed the wider community on the rights of people with disabilities. It helped DPOs to increase their profile and engage with their local constituencies. As Forrest and Philip describe, '[the consultation] helped build social capital in the disability rights movement in Australia.'⁹⁷ Until a draft *Convention* was finalised at the Ad Hoc Committee, similar events and consultations continued to be organised across Australia.⁹⁸ Despite its initial hostility towards the *Convention* and unsympathetic social justice policies at home, the Howard government made Australia one of the first countries to sign the *Disabilities Convention*. By galvanising people and promoting awareness, the *Convention* shaped the social fabric of Australia before its adoption by the UN.

The importance of the *Convention* should not be measured only by its social and political impact, but also by its impact on the lives of the individuals who were closely involved in the international and domestic processes around the *Convention*. Forrest and French nicely illustrate their personal experiences at the Ad Hoc Committee as:

Although it may be formally the product and possession of governments, in a very genuine and substantial way, the CRPD is our own collective composition: a synthesis of the diverse experiences and aspirations of persons with disabilities around the world; a fabric in which our past lives

⁹⁵ Interview with Rosemary Kayess, Director of Human Rights and Disability Project, the Australian Human Rights Centre at the Faculty of Law, University of New South Wales (Sydney, 26 March 2014).

⁹⁶ Forrest and French, above n 71, 198.

⁹⁷ Ibid.

⁹⁸ See, eg, Australian Federation of Disability Organisations, People with Disability Australia Incorporated, National Association of Community Legal Centres, *Chair's Texts of the Comprehensive and Integral International Convention on the Rights and Dignity of Persons with Disabilities: Report on National Consultation* (People with Disability Australia Incorporated, 2004)

<<http://www.pwd.org.au/issues/australian-national-consultations-and-reports.html#2005>>.

and future hopes are interwoven with those of others. Yet, even more than this, at a personal level, the quality of our experience of the CRPD negotiation process is measured not only by its political and legal outcome, but also in terms of our own life journeys. We have encountered new ideas, learned new skills, developed new insights, and forged new friendships. The process not only transformed international law, it also transformed the lives of many of those who participated, ourselves among them.⁹⁹

B *Galvanising disability activists*

Australian actors considered that the real impact of human rights treaties was felt at the community engagement level. Most importantly, as the research participants commonly suggested, the *Disabilities Convention* galvanised disability activists and people with disabilities.¹⁰⁰ For example, Frank Hall-Bentick said that:

Most people with disabilities have been very passive. Families were very passive. The *Convention* is providing a template and people starting to think of that 'these are the things that I should have and why I do not have it. I cannot wait for [the things that we should have] for another 50 years. Thanks for the scraps but it is not good enough. We want our issues to be a matter of priority of the state. It is empowering to people and the *Convention* is bringing people out of closet.'¹⁰¹

Rosemary Kayess described the changes triggered by the *Disabilities Convention* as:

There is energy created around the *CRPD*'s ratification and implementation. There is definitely a lot of impetus from disability sector to use the *CRPD* to drive change. On the ground, things have not much has changed. But there is a lot of policy, planning and advocacy happening at the moment. There is a conceptual shift for DPOs to advocate using the *CRPD* and human rights framework. These changes are driven by the *CRPD* and it provided very symbolic validation in embedding disability in human rights framework.¹⁰²

Ben Schokman from Human Rights Law Centre shared a similar story in the context of indigenous people's rights. He said:

One of the beautiful things I saw, when working in the remote indigenous communities, is that if you give the copy of the *Declaration of the Rights of Indigenous People*, they will read it for the first time and they will probably never have understood fully what human rights mean. But the language and

⁹⁹ Forrest and French, above n 71, 208.

¹⁰⁰ Interview with Graeme Innes, Disability Discrimination Commissioner, Australian Human Rights Commission (Sydney, 20 March 2014, updated via telephone on 25 July 2016), Interview with Sue Salthouse, Convener, Women with Disabilities Australia (Canberra, 15 March 2014).

¹⁰¹ Interview with Frank Hall-Bentick, Board Member, Australian Federation of Disability Organisations (Melbourne, 25 February 2014).

¹⁰² Interview with Rosemary Kayess, Director of Human Rights and Disability Project, the Australian Human Rights Centre at the Faculty of Law, University of New South Wales (Sydney, 26 March 2014).

the words immediately resonate with that person and they will be like ‘yes that is exactly how I felt about I should be treated and what my rights are.’¹⁰³

Australian actors consistently indicated that the *Convention* inspired and energised people. ‘It is such an exciting time to live in Australia as a person with disability’ noted a young disability activist from the Blind Citizen Australia.¹⁰⁴ While most research participants were positive about the activation of people with disabilities, a few people — mostly, male participants — were concerned that the activation may be a mere excitement that would not change much the situations on the ground. For example, Kevin Stone from the Victorian League for Individuals with a Disability said:

On ratification of the *Convention*, there was excitement and a lot of energy. But, for the people with disabilities out there, it can be another mockery. For thirty or forty years, we have been told that we have rights, but we are still discriminated against and do not get support. People tend to look at the *Convention* as another welcome affirmation of citizenship. But they did not think that this actually would help me. Few people will actually use our existing legislation on discrimination.¹⁰⁵

In addition to exciting and energising disability activists, research participants identified that the *Convention* contributed to a greater awareness of disability in Australia. They pointed out that, in relation to the NDIS, people became more aware of the concept of personal autonomy, and the underlying approach to disability services had started being challenged. A NSW government disability officer and the father to a disabled daughter noted that ‘carers of people with disabilities are increasingly recognising that duty of care should be balanced against dignity of risk.’¹⁰⁶ According to that person, the concept of ‘dignity of risk’ is increasingly recognised among policy-makers: ‘eliminating a risk from someone’s life and making them totally safe also eliminates their learning and maturation. Because people with disabilities have been cared for for a long time and often someone decides on behalf of them, their learning and development have been often restricted,’ he explained.¹⁰⁷

¹⁰³ Interview with Ben Schokman, Director of Legal Advocacy, Human Rights Law Centre (Melbourne, 20 February 2014).

¹⁰⁴ Interview with Lauren Henley, National Policy Officer, Blind Citizens Australia (Melbourne, 24 February 2014).

¹⁰⁵ Interview with Kevin Stone, Executive Officer, The Victorian League for Individuals with a Disability (Melbourne, 26 February 2014).

¹⁰⁶ Confidential Interview No 1 (Sydney, 27 March 2014) [The interviewee works for the Secretariat to the Disability Council NSW].

¹⁰⁷ Ibid.

‘If someone can blink, she/he is able to make a choice’ that officer asserted. He continued:

[This recognition] is a revolution for a number of reasons. For the government, it has been very difficult to get the idea that you need to surrender the control over to people with disabilities. On a personal level, it is very much revolution as well. Because, many people have grown up with the responsibility of looking after someone with disability in a way that you are looking after a child. It does not end when they turn 18. Turning around and start giving control to people with disabilities is very difficult. ... Very important part to this approach is an understanding that we all choose and make mistakes. Yes, people with disabilities will make mistakes. Yes, we have duty of care to ensure that they do not come to serious harm, because of those mistakes. But a little bit of hurt, embarrassment, be broken and not to be able to afford things for a while are okay. That is part of life’s learning process. They have a right to experience ups and downs as we do.¹⁰⁸

This interviewee further claimed that the NSW Department of Family and Community Service has absorbed such cultural change. ‘Ministers realised that “we know what is best for them” approach does not work. The concept of personal autonomy is becoming very powerful and it is now shaping State government policies,’ he noted.¹⁰⁹ Another officer of the NSW government, whose responsibility was making sure that State legislative reforms comply with the *Convention*, told a similar story. ‘The *Disability Inclusion Act 2014* (NSW) was drafted in response to a contemporary approach to people with disabilities,’ said that officer. ‘The *Convention* was a driving force for the change and the NDIS’s choice and control philosophy pushed the cultural change to get filtered to the State level.’¹¹⁰ Similarly, Joel Townsend from Victoria Legal Aid said that ‘at a cultural level, the *Convention* is producing a change in Australia. The NDIS and its concepts impacted on how community sees disability.’¹¹¹ Townsend further said that:

The *Disabilities Convention* has an important cultural impact that occurred through increased awareness of the *Convention* and capacity to use it in the policy advocacy. Many things are happening in the human rights landscape

¹⁰⁸ Ibid.

¹⁰⁹ Confidential Interview No 2 (Sydney, 27 March 2014) [The interviewee is in charge of advising for disability law reforms of the NSW government. He provides a training for local government officials on the *Disabilities Convention*].

¹¹⁰ Ibid.

¹¹¹ Interview with Joel Townsend, Program Manager, Migration and Social Inclusion Programs, Victoria Legal Aid (25 February 2014).

of the country simultaneously, which in combination promotes human rights awareness and culture.¹¹²

Regardless of their immediate outcomes, public inquiries and consultations seem to have significant cultural implications in Australia. Debates and dialogues that take place in the course of public inquiries contribute to changing public attitudes to disability and creating cultural changes. In relation to the JSCM's 'Enabling Australia' inquiry discussed in Chapter Six, the National Ethnic Disability Alliance (NEDA) — a national peak organisation representing the rights and interests of people with disabilities from culturally and linguistically diverse and non-English speaking backgrounds — initially found that other DPOs were not interested in changing discriminatory immigration policies. NEDA, however, persuaded its peers on the basis of the principles of the *Disabilities Convention* and successfully generated wider support for their efforts. A former executive director of NEDA, Dinesh Wadiwel, said:

The government actually encouraged the manifestation of racism in the disability sector. The beauty of rights discourse is that it has fundamentally shifted the language. We have started saying that this policy is effectively breaching the fundamental rights of people with disability. It cannot separate one person with disability from another. If you are saying to one person that you are a burden, you are effectively saying this to all persons with disability. It galvanised support from disability advocates. Before this point, people have been largely antagonistic to the idea of migration rights of people with disability. With the *Convention*, it became very easy to show that the government is being quite inconsistent in showing support to disability rights. The cultural change allowed people to put forward their views using rights language.¹¹³

IV THE *DISABILITIES CONVENTION* AS A FRAMEWORK

A *The Convention in policy-making*

Although the actual impetus for the recent reforms was not Australia's commitment to its international human rights obligations, the *NDS* and the *NDIS Act* are largely informed by, and referenced to, the *Disabilities Convention*. This part explores the reasons for such convergence. In order to adopt federal legislation such as the *NDIS Act*, which covers areas falling under the States' jurisdiction, the Commonwealth Parliament relies on its external affairs power, conferred by the *Constitution*. There is thus a

¹¹² Ibid.

¹¹³ Interview with Dinesh Wadiwel, Senior Lecturer and Director of Masters of Human Rights, Faculty of Arts and Social Sciences (former Executive Director of National Ethnic Disability Alliance) (Sydney, 20 March 2014).

technical, legal reason for the Commonwealth Parliament to refer to international treaties adopted by Australia.

Moreover, Australian actors consistently mentioned that the *Disabilities Convention* has been a useful framework in policy-making. I found three main avenues through which the *Convention* can enter into Australian policy dialogues and shape their outcomes: through policy makers, advisory groups and public inquiries. First, the *Convention* can inform policies through government bureaucrats. This point should be made with caution, because most Australian government officials, let alone ordinary people, may have little knowledge about international human rights treaties. ‘Generally, international events relating to Australia’s obligation under human rights treaties generally do not get publicised,’ said Eleanore Fritze, a senior lawyer from Victoria Legal Aid, who continued that:

I did not know that the UN Committee has reviewed Australia’s report under the *Disabilities Convention* and a set of recommendations were given to the government. Because I am personally interested in the area and do research, I got information from a UN website.¹¹⁴

Nonetheless, a handful of government officials, those who draft laws and policies, potentially know of the *Convention* and refer to it. Usually, laws and policies came from a small team of lawyers. For example, a team of three people — two lawyers and a team leader — drafted the *Inclusion Bill 2014* (NSW).¹¹⁵ The same is likely to be true for Commonwealth law and policy-making. ‘The *Convention* provided a template for both the *NDS* and the *NDIS Act*. Particularly for civil authorities, it worked almost like a checklist,’ noted Frank Hall-Bentick, who sits on various disability advisory boards in Victoria, and is actively engaged in Commonwealth policy-making.

The number of government officials, who have knowledge about the *Convention*, is potentially increasing. In relation to the recent reforms and increased government attention to disability issues, new offices and specialist disability divisions were established across Australia. For example, in 2013 the National Disability Insurance Agency was established as the NDIS administration. According to its latest report, the

¹¹⁴ Interview with Eleanore Fritze, Senior Lawyer, Mental Health and Disability Advocacy, Victoria Legal Aid (25 February 2014).

¹¹⁵ Confidential Interview No 2 (Sydney, 27 March 2014).

Agency employs over 1505 employees across the 28 sites and National Office as of June 2016.¹¹⁶ A Secretariat to the NSW Disability Council was founded in 2011.¹¹⁷ In 2011, Legal Aid Victoria established a Mental Health and Disability Law Advocacy Team. In February 2014, when I carried out a fieldwork research in Melbourne, the team, which started with 4.6 lawyers, had 9 lawyers.¹¹⁸ In most cases, people with lived experiences of disability were recruited for those positions and, for many of them, the *Disabilities Convention* is an important document.

Moreover, some research participants indicated that guidelines for community level policies or new staff induction manuals reflected the *Convention*, and provided avenues through which awareness about the *Convention* can grow among government officials. A NSW government official, who developed a manual for the internal use of his Department, said that ‘the *Convention* framed the entire document.’¹¹⁹ He further said that:

Policies that have been developed in the last six years started reflecting the *Convention* principles. Also the guidelines, you will see that the language of the *Convention* is clearly reflected. The department started to design the programs to fulfil the rights enumerated. ...Our education department however did not know that what they are doing is fulfilling the obligation under the *Convention* and it is human rights work. We also encourage our colleagues to proactively engage in the UN reporting. It will help them to understand the provisions of the *Convention*. The reporting was a huge opportunity of self-reflection.¹²⁰

Although not directly related to the point that I am making here, I found an interesting difference regarding the attitude towards the *Disabilities Convention* among similar bodies in different Australian jurisdictions. The *Disabilities Convention* seemed to have little relevance to the work of the Anti-Discrimination Board of NSW.¹²¹ In contrast, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), the equivalent body of the above mentioned NSW office in Victoria, seemed to be more

¹¹⁶ National Disability Insurance Agency, *Towards an Ordinary Life: Annual Report 2015-16* (October 2016) 84 <<https://www.ndis.gov.au/about-us/information-publications-and-reports/annual-reports.html>>.

¹¹⁷ Confidential Interview No 1 (Sydney, 27 March 2014).

¹¹⁸ Interview with Eleanore Fritze, Senior Lawyer, Mental Health and Disability Advocacy, Victoria Legal Aid (25 February 2014). I was not able to find an updated information about the number of staff in the team.

¹¹⁹ Confidential Interview No 2 (Sydney, 27 March 2014).

¹²⁰ Ibid.

¹²¹ Interview with Margaret Fahy, Legal Advisor, Anti-Discrimination Board of NSW (Sydney, 27 March 2014).

willing to embrace the *Disabilities Convention*, probably because of its mandate. A senior officer from VEOHRC said that:

With ratification of the *Disabilities Convention*, all of sudden we have a really comprehensive set of guidelines about what human rights look like for people with disabilities. We can draw on that. It is not about us telling court or parliament how we think they should interpret these rights. The *Charter [of Human Rights and Responsibilities Act 2006 (Vic)]* says we can point to that legitimate source of human rights. First of all, the *Charter* is important to us as it gives legitimation to say that you need to do that and then the *Convention* provides articulation of the rights.¹²²

Second, the *Convention* norms inform expert advice given to Ministers and senior government officials. All Australian governments work with independent disability advisory groups, who usually monitor the implementation of disability policies and ensure that government policies reflect the needs and experiences of people with disabilities. Disability advisory groups often consist of activists and experts with a variety of backgrounds but who have knowledge of the *Convention* and may even have participated in the *Convention*'s drafting. They therefore have a strong sense of belonging.¹²³ Disability advisory groups generally have productive and constructive engagement with Ministers. Disability Council NSW is one such advisory body established in 1987.¹²⁴ The Council members are appointed by the NSW Governor on the recommendation of a Minister for Disability Services. As of April 2014, the Council had in total 19 members, of which 17 members were people with disabilities. A government official working closely with the Disability Council NSW said that:

¹²² Confidential Interview No 3 (Melbourne, 25 February 2014) [The interviewee holds a senior position at the VEOHRC, and works with Disability Reference Group.]

¹²³ Interview with Ben Schokman, Director of Legal Advocacy, Human Rights Law Centre (Melbourne, 20 February 2014). Schokman noted:

Individual championship can play a significant role in treaty implementation. There were key Australians who played influential roles in drafting and passage of the *CRPD*. This influenced why disability sector took the treaty along with them. When leaders of a community play significant role in creation of a human rights instrument, such a participation can take the community along. By analogy, this is a case for indigenous sector of Australia. It is happening in the aging sector too. Key individuals, their familiarity with human rights concepts and their leadership around the rights issues can mean that sector would be particularly engaged.

¹²⁴ See Disability Council NSW, *About us: Disability Council NSW* (22 January 2016) <http://www.disabilitycouncil.nsw.gov.au/about_us>. The mandate and functions of the Disability Council NSW are renewed under the *Disability Inclusion Act 2014* (NSW). The Council has 12 members who are appointed by the NSW Governor on the advice of the Minister for Disability Services.

If somebody proposed something that is not in line with the principles of the *Disabilities Convention* at the Council, it gets held up. The *Disabilities Convention* provides a reference point to any discussion around disability. Ministers or key politicians may not know about the *Convention*. But the people on the Council know it and 99 per cent of the entire decision or advice giving to the Minister will comply with the *Disabilities Convention*.¹²⁵

Similarly, a Victorian government officer also said that:

Engagement with the self-advocacy groups is a big part of our work and we try to build a constructive working relationship with these advocacy groups. We often rely on what they say to inform our policies. ...The language and structure of the *Victorian State Disability Plan* is very similar to the *NDS*, which closely aligns the *UN Convention*. It is very easy to map articles of the *Convention* against different areas of the *Disability Action Plan*.¹²⁶

Third, the *Disabilities Convention* can enter into policy discussions through public inquiries and consultations. While Australian actors were highly critical of public consultations, saying that they could be superficial and meaningless, these events can have significant cultural implications. ‘Even though it is superficial, a consultation can create public expectation. It would be dangerous for governments,’ said Brian Burdekin.¹²⁷ Civil society actors and academics are active contributors to inquiries and consultations, and their well-researched and persuasive submissions can shape outputs to a large extent. Disability activists indicated that the *Disabilities Convention* often underpins their submission. The following section discusses the *Convention*’s implications and utility in Australian disability activism.

B *The Convention and DPOs*

The research participants pointed out two differences that the *Convention* made to Australian DPOs. First, it provided an opportunity to develop their expertise and increase social profiles. In the last few years, new DPOs were established and some older DPOs became more active. For example, Children and Young People with Disability Australia was established in 2008.¹²⁸ The First Peoples Disability Network

¹²⁵ Confidential Interview No 1 (Sydney, 27 March 2014).

¹²⁶ Confidential Interview No 4 (Melbourne, 28 February 2014) [The interviewee works for the Victorian government, and is responsible for formulating disability policies and facilitating their implementation].

¹²⁷ Interview with Brian Burdekin, Visiting Professor, Raoul Wallenberg Institute, Lund University (Australia’s first federal Human Rights Commissioner) (Sydney, 26 March 2014).

¹²⁸ Interview with Stephanie Gotlib, Chief Executive Officer, Children and Young People with Disability Australia (Melbourne, 24 February 2014).

Australia, although founded 15 years ago, was ‘recognised by the government and started being funded properly only 5-6 years ago.’¹²⁹ The First Peoples Disability Network Australia is now an active player in both disability and indigenous rights fora in Australia and at the UN. While the International Year of Disabled Persons (1981) resulted in the formation of rights-focused DPOs in Australia, as discussed in Chapter Six, the focus of disability activism shifted to consumerism in the 1990s.¹³⁰ The rights-focus of Australian disability activism seemed to have revitalised in the last decade. Moreover, Australian actors indicated that DPOs became more capable and articulate. Brian Burdekin argued that:

When I was a federal human rights commissioner [1986-94], there were not many articulate and powerful NGOs. For instance, there were virtually none advocating for the rights of people with disabilities. There were number of organisations for people with physiocratic disabilities. However, their foci were more about caring for people rather than advocating rights. We now have articulate civil society organisations.¹³¹

Second, the research participants thought that the *Convention* helped to bring disability activists together and broadened their networks. Various international and domestic processes were critical in the change. Mobilisation around the NDIS was commonly identified as an important exercise of collaboration among DPOs. Reporting to treaty bodies and the UPR produced a similar effect on DPOs. ‘One of the important things about the CRPD reporting process from an NGO perspective was that it brought together a whole range of different disability organisations that won’t be contributing to the report in such collaborative and unified way,’ said Ben Schokman.¹³² Related to the

¹²⁹ Interview with Damian Griffiths, Executive Director, First People’s Disability Network (Sydney, 28 March 2014).

¹³⁰ See, eg, Christopher Newell, ‘The Disability Rights Movement in Australia: A Note from the Trenches’ (1996) 11(3) *Disability & Society* 429.

¹³¹ Interview with Brian Burdekin, Visiting Professor, Raoul Wallenberg Institute, Lund University (Australia’s first Federal Human Rights Commissioner) (Sydney, 26 March 2014).

¹³² Interview with Ben Schokman, Director of Legal Advocacy, Human Rights Law Centre (Melbourne, 20 February 2014). The report project team consisted of Australian Centre for Disability Law, Australian Disability Rights Network and Redfern Legal Centre, Australian Federation of Disability Organisations, Australian Human Rights Centre, Disability Advocacy Networks Australia, First People Disability Network Australia, People with Disability Australia and Queensland Advocacy Incorporated. Seventy-one civil society organisations wholly and partially endorsed the report. In developing the report, the project team organised consultations all major cities and received over 200 submissions. A website was created for the reporting, which also disseminated the information about disability rights, the *Convention* and reporting process. See Disability Representative, Advocacy, Legal and Human Rights Organisations, *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities* (August 2012).

report-writing process, Kevin Stone also identified the cultural value of these activities saying that ‘the shadow report was a highly relevant process, which allowed many people to know about the *Convention*.’¹³³ The improved collaboration does not mean that no tension exists among Australian DPOs. In fact, the Australian disability sector is, as Forrest and Phillip describe, a ‘hotly contested space with many organisations competing for recognition and legitimacy.’¹³⁴ But, still, such processes enabled DPOs to hold dialogues and identify common ground for mobilisation.¹³⁵

In addition to the changes occurring to DPOs, Australian disability activists identified three practical uses of the *Convention* in their work. First and foremost, the *Convention* has widened the dialogue between government and people. Denish Wadiwel said that:

Before the *Convention*, disability sector and government were stuck in discussions about whether there are enough resources. The typical language of discussion around disability was about adequacy of funding. Post ratification, the language has shifted interestingly. Advocates started saying to the government — ‘are you meeting your obligations under the *Disabilities Convention*?’ In some ways, it helped to shift the debate from scarcity of resources, which is still there, to a broader one ‘how are people with disabilities political, economically and socially participating in the

¹³³ Interview with Kevin Stone, Executive Officer, The Victorian League for Individuals with a Disability (Melbourne, 26 February 2014).

¹³⁴ Forrest and Phillip, above n 71, 196. They write:

Several generations of DPOs coexist in this space, not altogether peacefully. They include first-generation organisations structured according to particular impairment conditions, second-generation organisations structured on a cross-disability and cross-population group basis and third generation organisations structured according to a particular population groups. Additionally, various types of organizations claim representative legitimacy. They include DPOs, disability-rights and advocacy organizations, peer-led service providers for persons with disabilities, parent- and family-based organizations, industry groups for disability service providers, and professional associations. Nor are these organizations distributed equally across state and territorial lines. These dynamics, coupled with Australia’s geography and low population density, make it very difficult for DPOs to caucus, achieve consensus, and work in strategic alignment on issues of common concern.

¹³⁵ NEDA’s former executive director, Dinesh Wadiwel, said:

Maybe we need to think about how people are to be able to unite around change. Presenting this constituency as undivided is unrealistic. People with disabilities are fundamentally divided in terms of barriers they face. Even for the people who face the same barriers are politically divided in how to approach these problems. Some people may say that I just want to work, but others may say that I do not want to work. This is a political dimension. I think this is a reasonable demand. Maybe we need to encourage more diverse voices within the community.

society? ... The language shift allowed us to look at how people with disabilities have been systemically disadvantaged in Australian society.¹³⁶

Second, disability activists viewed the *Convention* as a useful framework in their activities and advocacy, providing benchmarks to evaluate the quality of disability policies. Frank Hall-Bentick described the utility of the *Convention* as such:

‘When Christianity and other world religions came into existence, the Bible, Koran, Torah etc. became the holy grail for them. The *Convention* is the same. It is giving a template to the advocacy organisations and people with disabilities around the world.’¹³⁷

Ngila Baven gave the most detailed description, relating to how People with Disabilities Australia Inc. uses the *Convention* in its advocacy, saying:

We produce data by collecting information on the basis of the CRPD and our systematic advocacy is based on the CRPD. For everything we write, we will talk about the CRPD and write within the framework of the CRPD. So we will explain relevant articles. Then we will say this is what it does mean and this is what situation is here and this is what we want to see.¹³⁸

Moreover, Janine Cootes from the Intellectual Disability Rights Service said that:

Before the *Convention*, many of us thought that disability services were okay. But, when you start thinking through the *Convention*, you would see that Australian disability services were not okay, because the services are not providing a choice to people. The *Convention* gave a different way of thinking about inclusion of people with disabilities. It just challenged how you think about disability. People have a right to choose. But really what choice do people with disabilities have?¹³⁹

Australian non-profit disability organisations differ in their willingness to embrace the *Disabilities Convention*. So-called national disability peak bodies such as PwDA, NEDA, Australian Federation of Disability Organisations, Women with Disabilities Australia, Blind Citizens Australia, First Peoples Disability Network Australia and Children and Young People with Disability Australia and their members are rights-based organisations. In many cases, leaders of these organisations took part in the

¹³⁶ Interview with Dinesh Wadiwel, Senior Lecturer and Director of Masters of Human Rights, Faculty of Arts and Social Sciences (former Executive Director of National Ethnic Disability Alliance) (Sydney, 20 March 2014).

¹³⁷ Interview with Frank Hall-Bentick, Board Member, Australian Federation of Disability Organisations (Melbourne, 25 February 2014).

¹³⁸ Interview with Ngila Baven, Human Rights Advisor, People with Disabilities Australia Inc. (Sydney, 27 March 2014).

¹³⁹ Interview with Janine Cootes, Executive Officer, Intellectual Disability Rights Service (Sydney, 19 March 2014).

Convention's drafting and, therefore, have more sense of responsibility towards the treaty. In contrast, most disability advocacy organisations refer to applicable disability service legislation and are less willing to use the *Convention*. Nonetheless, there were some exceptions. Communication Rights Australia is one such advocacy organisation, researching and testing a human rights framework for disability advocacy.¹⁴⁰

Third, Australian DPOs leverage the *Disabilities Convention* as hard international law that reinforces the legal grounds of their arguments.¹⁴¹ 'Having binding international obligations means that the level of discussion has lifted,' explained a former Disability Discrimination Commissioner, Chris Sidoti. He further said that:

Human rights is a philosophy, you can philosophise, intellectualise and conceptualise. All that is important, very important. But when you actually come to the point of telling the government what to do, we have a body of specific law. Then we can say that we have this treaty. In this provision, it says that and you are not doing that. It is much more powerful argument than an argument that is simply based on philosophical and ethical principles.¹⁴²

Rosemary Kayess described the application of the *Convention* similarly:

The *Convention* is a powerful instrument to hold government accountable, although relatively symbolically. We cannot just say to the government that 'no, this policy is bad.' We need to use the *Convention* as a mean of saying 'this policy is not good enough to meet your international obligations.' It gives legitimacy to our claim. ...The *CRPD* also gives us reference when we structure a legal claim. When someone makes a *DDA* claim, we can place such a claim within the context of rights. So we can identify the claim in terms of human rights violation as well as that of the *DDA*. The *Convention* is an interpretive aid and also becomes an area of casework.¹⁴³

V CONCLUSION

Comparing to the story that is based on legal and policy changes, the contextual story provides a more complex picture regarding the ways that the *Disabilities Convention* plays out in Australia. The NDIS example suggests us two potential dynamics of treaty

¹⁴⁰ See Communication Rights Australia, 'Who we are' <<http://www.caus.com.au/about-us/what-we-do>>. Interview with Jan Ashford, Chief Executive Officer, Communication Rights Australia (Melbourne, 27 February 2014).

¹⁴¹ Informal conversation with Craig Wallace, President, People with Disability Australia (Canberra, 10 December 2013).

¹⁴² Interview with Chris Sidoti, Senior Consultant, Asia Pacific Forum of National Human Rights Institutions (former Disability Discrimination Commissioner of the AHRC) (Sydney, 18 March 2014).

¹⁴³ Interview with Rosemary Kayess, Director of Human Rights and Disability Project, Australian Human Rights Centre at the Faculty of Law, University of New South Wales (Sydney, 26 March 2014).

impacts. Firstly, it reminds that the direct connection may not always exist between a treaty ratification and a domestic legal reform. The Rudd Labor government was predisposed to undertake social justice reforms, including disability service reform. In this context, the NDIS happened to be an accidental revival of an idea that suited all major interests. On the ground, these reforms were largely perceived as political stories, not as triumphs of international law. The NDIS yielded a wide public support, mostly because of its apparent Australian dimensions relating to egalitarianism and consumerism. Secondly, although the *Convention*'s influence to the NDIS was meagre, the *Convention* may have influenced the political context, which made the reform achievable at that point of time. The local actors, who were closely involved in the NDIS process, the *Convention* helped to create a momentum that made the NDIS possible. Once a political decision in favour of a legal or policy instrument was made, the *Convention* proved to be an effective framework in drafting the instrument.

The most direct impact of the *Convention* that I identified in Australia was non-legal. It created energy among disability activists and galvanised people with disabilities. In the last decade, disability issues, which once were on the periphery, came into the centre of public policy discourse in Australia. Laws and policies adopted at Commonwealth and State levels reflected the language of the *Disabilities Convention* and referenced it. The number of government agencies and specialist divisions dealing with disability issues increased, as did disability non-profit organisations. Local actors identified that policy-makers and the general public became more aware of the autonomy of people with disabilities, and this new attitude filtered down to legal and policy instruments. The *Disabilities Convention* has influenced Australian social, cultural and political spheres, regardless of ratification and domestic legal incorporation.

An exploration of the impact of the *Disabilities Convention* should not be restricted by the domains of law, society and politics. Australian disability actors considered that their participation in the negotiation, ratification and implementation of the *Convention* enriched their experiences as individuals. Such engagements enabled DPOs to learn from, share with, and befriend like-minded people from different countries. Although Australia's disability sector has visibly changed in the last decade and most research participants sensed that those changes were somehow related to the *Disabilities*

Convention, it is hard to identify the *Convention*'s impact in a precise manner. The processes creating change were often diffuse and unpredictable. The actions relating to adoption, ratification and implementation of the *Convention*, as well as those around domestic legal reforms, galvanised disability activists and then, in combination, produced a myriad of effects.

CHAPTER EIGHT

THE *DISABILITIES CONVENTION* IN MONGOLIA: AN INSTRUMENTALIST STORY

I INTRODUCTION

This Chapter presents an instrumentalist story of the *Disabilities Convention*, reviewing two key examples of legislative changes that are claimed to have implemented the treaty in Mongolia. While it is possible to conclude that the Mongolian government demonstrates a strong commitment to implement its obligations under the *Convention*, particular conditions pertaining in such legal developments put the commitment in question. The Chapter comprises three parts. Part II describes the development of Mongolian disability policies and laws, setting the scene to evaluate the changes made to the policies as a result of the *Disabilities Convention*. It highlights that Mongolian disability policy, which has a strong focus on social welfare, started reflecting elements of social approaches to disability in the mid-1990s. Part III discusses the processes of the *Convention*'s ratification and the immediate steps that Mongolia took to implement its treaty obligations. Mongolia ratified the *Disabilities Convention* in December 2008 and reformed its disability laws, especially in-between 2012-16, adopting *the Law on the Rights of a Person with Disability 2016*¹ and introducing an early intervention mechanism addressed to children with disability. While Mongolia has produced an impressive range of policies in the area of disability that are claimed to be measures to implement the *Disabilities Convention*, their tangible outcomes are meagre. Part IV discusses the reasons for the poor implementation of disability laws and policies.

II DEVELOPMENT OF DISABILITY POLICY IN MONGOLIA

Since Mongolia's independence, the *Ardyn Zasag* started taking measures to assist its vulnerable citizens.² But, only in the 1940s was the foundation of Mongolia's social

¹ Хөгжлийн бэрхшээлтэй хүний эрхийн тухай [Law on the Rights of a Person with Disability] (Mongolia) adopted on 5 February 2016 (*Law on the Rights of a Person with Disability 2016*).

² According to Songokhbayar Dovdon, the first social policy measures taken by the newly established *Ardyn Zasag* included the adoption of two resolutions in 1921 – 'Assistance and Recovery for the Impoverished' and 'Benefit for the War Widows and Families' – and the establishment of the first nursery in 1924. Dovdon Songokhbayar, 'A Theoretical Proposal [Онолын шинжтэй оновчтой санал]' in Tsogzayabaatar Z (ed), *A Train of Hope: Memoir for the 10th Anniversary of Mongolian National Federation of the Organisations of People with Disabilities [Итгэл тээсэн илчт тэрэг]* (Monhiin Ongo Press, 2007) 49, 52.

security system laid down. The *Constitution of the Mongolian People's Republic 1940* (the *1940 Constitution*) guaranteed the right of workmen 'to get material assistance in events of old age, illness and a loss of capacity.'³ The *Constitution of the Mongolian People's Republic 1960* (the *1960 Constitution*) expanded social security measures, providing that '[t]he citizens of the People's Republic of Mongolia shall be entitled to get material assistance in the events of old age, illness, a loss of capacity and loss of a breadwinner.'⁴

The evolution of Mongolian disability policies has not been recorded. On the basis of available evidence, it can be said that the disability policies, which was restricted to pensions, had diversified by the 1970s. In 1964, the first special school was established.⁵ In the 1970s, the government started taking measures on rehabilitation and diagnosis of people with disabilities. For example, the Council of Ministers issued a resolution on improving the production of prostheses and artificial limbs.⁶ The *Law on Public Health 1977* provided for procedures to diagnose and assess the level of disability and the provision of a disability pension and social assistances.⁷ In 1964, the Mongolian Society of the Red Cross opened a workshop for people with visual and hearing impairments.⁸ The workshop was expanded to an Office of Sheltered Employment of Blind Citizens by *Resolution No 305 of 1974* of the MPR Council of Ministers and further expanded to a factory by *Resolution No 273 of 1980* of the MPR

³ Бүгд Найрамдах Монгол Ард Улсын Үндсэн хууль [*Constitution of the Mongolian People's Republic*] (Mongolia) adopted on 30 June 1940 (*1940 Constitution*) art 91. Article 91 of the *1940 Constitution* further provides that 'workmen and servicemen shall be provided a social security system at the cost of the government and employers and such right shall be fulfilled through the provision of free medical assistance and development of sanatoriums and resting homes.'

⁴ Бүгд Найрамдах Монгол Ард Улсын Үндсэн хууль [*Constitution of the Mongolian People's Republic*] (Mongolia) adopted on 6 July 1960 (*1960 Constitution*) art 71.

⁵ Economic and Social Council, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Reports submitted in accordance with Council Resolution 1988 (LX) by Mongolia*, UN Doc E/1978/8/Add.6 (3 January 1978) 3.

⁶ See William E. Butler (ed), *The Mongolian Legal System: Contemporary Legislation and Documentation* (Martinus Nijhoff Publishers, 1982) 482. Council of Ministers, Mongolian People's Republic, *Improving the provision of artificial limbs*, Decree No 220 of 1973, May 1973. Decree 220 of 1973 provided that those who went disabled because of accidents or diseases resulting from the nature of the workplace as well as those who went injured from natural disasters should be provided with equipment free of charge while others should get a reduced price.

⁷ Нийтийн эрүүл мэндийн тухай [Law on Public Health] (Mongolia) adopted on 27 June 1977. Article 74 of the law provides for the conditions to granting prosthetics and chapter 9 sets out the procedures of medical assessment of disability.

⁸ Vocational Training Centre of Visually Impaired People, *A Brief History* (21 November 2011) <<http://blind-enterprise.blogspot.com.au>> (my translation).

Council of Ministers.⁹ The Factory and Vocational Training of Visually Impaired People still exists today. In 1978, the Society of Deaf and Blind (SDB) — the first community organisation of people with disabilities — was established, affiliated to the Office of Sheltered Employment of Blind Citizens.¹⁰ As with all community organisations of a socialist state, the SDB's responsibility was to implement directions of the government and the party as well as to provide government services to its members.

In the aftermath of the regime change in 1990, generous subsidies from the USSR stopped and the Mongolian economy collapsed. Hard pressed by funding shortages and encouraged by international financial agencies to be less involved in economic activities, the Mongolian government failed to maintain its social security policies.¹¹ As a result, a range of social problems that hardly existed during socialism, such as alcoholism, single-parent families and street children, have emerged. People with disabilities were amongst the most affected by the economic turmoil. An NGO report described the living situation of people with disabilities as:

The disabled people in Mongolia are belonging to the poorest and most vulnerable group in the society. After transition to the market economy and budget cuts for health, social welfare and education services, people with disabilities faced a huge variety of problems, having very limited capacity for competency in the free market system. Due to the growing inflation rate, the social subsidy equal to 13800 to 17600 *tugriks* in a month cannot cover even the most essential needs such as rent, heating and food. An estimated 88 per cent of disabled people live in poverty, as compared to 36 per cent of the population as whole. It is really difficult to describe all the difficulties and sufferings of the disabled people in our country, especially those who have severe moving problems and blindness. Most of them just pass day after day trying to survive with the small amount of money given as social welfare.¹²

As discussed in Chapter Six, the International Year of Disabled Persons resulted in significant changes in Australia, but, the event seemed to have had little impact on Mongolia. Instead, the Asian and Pacific Decade of Disabled Persons (1993-2002)

⁹ Ibid.

¹⁰ Interview with Gerel Dondov, President, National Association of Blind Citizens (Ulaanbaatar, 4 June 2013, updated via Skype on 12 June 2015).

¹¹ Morris Rossabi, *Modern Mongolia: From Khans to Commissars to Capitalists* (University of California Press, 2005) 111.

¹² Central Committee of Mongolian DPOs, *NGO report: Evaluation of the Asia Pacific Decade Activities* (Oct 2002)

<http://www.dinf.ne.jp/doc/english/intl/02rnn/mongolia_e.html>.

ushered significant changes to Mongolian disability policies. In relation to the Decade, the Mongolian government adopted a resolution in 1992.¹³ The decree approved three items, but the first item, which is understood from the context to be an approval of an action plan for the Decade, was nullified in 1994.¹⁴ It assured the engagement of DPOs in the Decade's activities,¹⁵ and ordered the governors of provinces and the capital city to implement a plan for the Decade and report annually to a National Committee.¹⁶

By the mid-1990s, Mongolian disability policies had changed dramatically. The first specific disability legislation, the *Law on the Social Protection of Handicapped Citizens 1995*,¹⁷ was adopted. Mongolia also adopted its first national disability policy, the *National Action Plan on Improving the Livelihood of Handicapped Citizens*, in 1998.¹⁸ Some measures directed to improving the livelihood of people with disabilities were also taken.¹⁹ Moreover, laws and policies started reflecting issues of social accessibility. For example, the *Law on Public Construction 1998* provides that 'a plan of public construction must reflect the special needs of wheelchair users.'²⁰ On 3 February 1998, Mongolia ratified the ILO's *Vocational Rehabilitation and Employment (Disabled Persons) Convention*.²¹ *Labour Law 1999* was amended in 2003 and introduced an employment quota for people with disabilities.²² The government agencies dealing with disability issues were reformed. In 1999, on the basis of two institutions, the Centre for Vocational Training and Manufacturing and the Prosthetic Workshop, the National Centre for Training and Rehabilitation was established under the Ministry of Labour and Social Welfare.

¹³ Government of Mongolia, *On the Activities to be Organised within the Framework of the Asian and Pacific Decade of Disabled Persons*, Resolution No 70 of 1992, 18 December 1992.

¹⁴ The first item was nullified by Government of Mongolia, *Resolution No 66 of 1994*.

¹⁵ Ibid item 2.

¹⁶ Ibid item 3.

¹⁷ Тахир дутуу хүний нийгмийн хамгааллын тухай [Law on the Social Protection of a Handicapped Person] (Mongolia) adopted on 19 December 1995.

¹⁸ Government of Mongolia, *On Approving a National Program*, Resolution No 202, 4 November 1994.

¹⁹ Government of Mongolia, *On Supporting the Employment Opportunities for People with Disabilities*, Resolution No 116, 28 June 1995. MNT 50 million was allocated for providing credit to small businesses of people with disabilities.

²⁰ Барилгын тухай [Law on Public Construction] (Mongolia) adopted on 7 August 1998 art 9(1)(3).

²¹ *ILO Convention No 159*.

²² Хөдөлмөрийн тухай [Labour Law] (Mongolia) adopted on 14 May 1999 art 111.

Meanwhile, Mongolian DPOs, which remained relatively dormant in the early years of the regime change, became activated.²³ On 20 June 1997, 35 DPOs came together under an umbrella body, forming the Mongolian National Federation of the Organisations of People with Disabilities (DPO Federation).²⁴ According to its founding members, the idea initially came from international consultants, who worked for disability projects of ILO and Danish Development Cooperation (DANIDA). The increased attention of the Mongolian government on disability issues, which was triggered by the Asian and Pacific Decade, also became a stimulus.²⁵ From the beginning, the DPO Federation sought to maintain a close engagement with influential politicians in social policy areas, offering them a presidential role.²⁶ On the day of the DPO Federation's inaugural meeting, founding members requested Batbayar Sharavjamts,²⁷ a Parliament member and then Minister of Health and Social Welfare (1998-9), to become President. Batbayar served in the role from 1997-9, and was succeeded by Ghandi Tugsjargal,²⁸ former chair of the Parliamentary Standing Committee on Social Policy (2000-4) and then Minister of Health (2004-6) and of Social Protection and Labour (2008-12). Ghandi was a President of the DPO Federation from 2000-4.

The Mongolian government proclaimed 2001 as the Year of Promoting Handicapped Citizens.²⁹ According to a President of the DPO Federation, Oyunbaatar Tsedev, the Year, which triggered another wave of changes to Mongolian disability policy, was proclaimed largely because of the efforts of Gandhi.³⁰ On the occasion, the government adopted an action plan that sets out a range of measures designed to improve the accessibility and availability of public roads and buildings, mass media, and cultural,

²³ In 1991, the Association of the People with Disabilities was established in affiliation to the Red Cross Mongolia. Tsogzayabaatar Z (ed), *A Train of Hope: Memoir for the 10th Anniversary of Mongolian National Federation of the Organisations of People with Disabilities* [Итгэл тээсэн илчт тэрэг] (Monhiin Ongo Press, 2007) (*A Train of Hope Memoir*) 81.

²⁴ Ibid 12.

²⁵ Ibid 11. A President of the DPO Federation, Oyunbaatar Tsedev, recalled in his memoir that UN Special Rapporteur Bengt Lindqvist first suggested that Mongolian DPOs to form an umbrella organisation.

²⁶ Ibid 17. The Presidents of the DPO Federation significantly contributed not only to its political mission, but also to its material conditions. For example, organising the office seems to have been an 'unwritten' responsibility of the Presidents.

²⁷ See Alan J.K. Sanders, *Historical Dictionary of Mongolia* (Scarecrow Press, 3rd ed, 2010) 91-2.

²⁸ See ibid 293-4.

²⁹ Government of Mongolia, *On Proclaiming the Year of Supporting Handicapped Citizens*, Resolution No 16 of 2001 (24 January 2001).

³⁰ *A Train of Hope Memoir*, above n 23, 33.

sports and leisure activities to people with disabilities.³¹ A high-level national committee was established to monitor the plan's implementation.³² The action plan was followed by ministerial decisions, providing specific guidance in organising the implementation of the plan.³³

In 2005 the *Law on Social Protection of a Handicapped Citizen 1995* was revised and changed its title to the *Law on Social Protection of a Citizen with Disability 2005*.³⁴ The revised law still took a conventional social welfare approach to disability, expanding the types of entitlements and social assistances available to people with disabilities.³⁵ Rehabilitation and prevention from disability were also promoted as the principal strategies of the policy area.³⁶ However, the law expanded its coverage to new areas such as social accessibility, employment, education and cultural life and promoted the social participation of people with disabilities.

Between 2006-8, Mongolian disability laws and policies continued developing with renewed vigour. In November 2006, in relation to the adoption of the *Biwako Millennium Framework for the Asian and the Pacific Decade of Disabled Persons*,³⁷ the *National Program on Supporting People with Disabilities 2006*³⁸ and the *Sub-program on Promoting Social Participation of Children with Disabilities 2006*³⁹ were adopted. While drawing up various strategies for preventing disability and rehabilitating people with disabilities,⁴⁰ these *Programs* emphasised the social participation of people with

³¹ Government of Mongolia, *On Proclaiming the Year of Supporting Handicapped Citizens*, Resolution No 16 of 2001(24 January 2001) app 1.

³² Ibid app 2. The Committee, which was headed by a Vice-Minister of Labour and Social Protection, comprised senior officials from relevant ministries and government agencies, and representatives from three DPOs, including the DPO Federation, the MNAB and the Foundation for (Wellbeing of) People.

³³ Minister of Infrastructure of Mongolia, *On Accessibility of Public Roads and Cross Roads*, Decree No 348 of 2001, 6 December 2001.

³⁴ Хөгжлийн бэрхшээлтэй иргэний нийгмийн хамгааллын тухай [Law on Social Protection of a Citizen with Disability] (Mongolia) adopted on 8 December 2005.

³⁵ Ibid arts 5, 6, 7, 9.

³⁶ Ibid art 6.

³⁷ *Biwako Millennium Framework for Action towards an Inclusive Barrier Free and Rights Based Society for Persons with Disabilities in the Asia and the Pacific*, United Nations Economic and Social Council, Economic and Social Commission for Asia and the Pacific, UN Doc E/ESCAP/APDDP/4/Rev.1 (24 January 2003).

³⁸ Government of Mongolia, *On Approving a National Program (National Program on Supporting Disabled Citizens)*, Resolution No 283 of 2006, 21 November 2006, app 1.

³⁹ Ibid app 2.

⁴⁰ Ibid app 1, goal 6.

disabilities and identified negative social attitudes to disability as a barrier to social participation.⁴¹

The relevant laws were amended extensively in order to improve the type and degree of social assistance and the conditions for social participation of people with disabilities. The *Law on the Elementary and Secondary Education 2002* was amended on 8 December 2006, clarifying the status and government support of special schools.⁴² On 3 August 2007 several laws, including the *Law on Public Roads 1998*,⁴³ the *Law on Public Transportation 1999*,⁴⁴ the *Law on Income Taxation of Business Entities 2006*⁴⁵ and the *Law on the Physical Education and Sports 2003* were amended and reflected various measures to support the social participation of people with disabilities.⁴⁶

On 15 January 2008 the *Law on Social Welfare 2005*⁴⁷ and the *Law on Social Protection of a Citizen with Disability 2005*⁴⁸ were amended, significantly increasing the form and extent of social services and assistance to people with disabilities. The Parliament adopted the *Comprehensive National Development Strategy based on Millennium Development Goals 2008*, which identified the increased social participation of people with disabilities as a priority.⁴⁹ Despite these developments,

⁴¹ Ibid app 1, goals 1, 2.

⁴² Бага, дунд боловсролын тухай [Law on the Elementary and Secondary Education] (Mongolia) adopted on 3 May 2002 art 13 (amendment of 8 December 2006). Article 13(3) obligates public schools to create conditions for children with disabilities to study.

⁴³ Авто замын тухай [Law on Public Roads] (Mongolia) adopted on 2 January 1998 art 5(1)(5). The amendment sets a requirement for responsible authorities to ‘develop and approve the standard or guidance concerning the construction, modification and maintenance of public roads suited to people with disabilities.’ Moreover, article 21(3) exempted special vehicles for people with disabilities from public road utility tax.

⁴⁴ Авто тээврийн тухай [Law on Public Transportation] (Mongolia) adopted on 4 June 1999 arts 10(1), 10(2)(9). The amendments set out a quota of accessible public transportations.

⁴⁵ Аж ахуйн нэгжийн орлогын албан татварын тухай (шинэчилсэн найруулга) [Law on Income Taxation of Business Entities (revision)] (Mongolia) adopted on 29 June 2006 arts 19(8), 19(10). The amendments permitted tax concessions to business enterprises, which employed people with profound disabilities or donated to MNT 1000000 to DPOs.

⁴⁶ Биеийн тамир, спортын тухай [Law on the Physical Education and Sports] (Mongolia) adopted on 31 October 2003 arts 10(1)(8), 18(11). Article 10(1)(8) sets out a requirement that metropolitan and provincial governors make at least 10 per cent of the sport facilities under their control accessible to people with disabilities. Article 18(11) establishes a national Paralympic team.

⁴⁷ Нийгмийн халамжийн тухай хууль нэмэлт, өөрчлөлт оруулах тухай [Law approving amendments to the Law on Social Welfare] (Mongolia) adopted on 15 January 2008.

⁴⁸ Хөгжлийн бэрхшээлтэй иргэний нийгмийн хамгаалын тухай хуульд нэмэлт, өөрчлөлт оруулах тухай [Law approving amendments to the Law on Social Protection of a Citizen with Disability] (Mongolia) adopted on 15 January 2008.

⁴⁹ Parliament of Mongolia, *On Approving the Comprehensive National Development Strategy based on Millennium Development Goals*, Resolution No 12, 31 January 2008.

people with disabilities remained invisible in many other areas of Mongolian law and policy, such as political participation, administration of justice, marriage and family, and reproductive health.

III IMPLEMENTATION OF THE DISABILITIES CONVENTION IN MONGOLIA

A Ratification

On 19 December 2008, the Parliament adopted the laws ratifying the *Disabilities Convention* and its *Optional Protocol*.⁵⁰ The decision was made by an absolute majority, with 37 Parliament members in favour and one member dissenting.⁵¹ Mongolia did not sign the treaties when they were open for signature and, therefore, domestic ratifications of the treaties were perceived internationally as accessions. According to UN records, Mongolia acceded to the *Convention* and the *Optional Protocol* on 13 May 2009. The treaties entered into force for Mongolia on 13 June 2009. Mongolia did not make a reservation or an interpretative declaration to the *Convention* and the *Optional Protocol*. Unlike Australia, Mongolia's engagement in drafting of the *Convention* was minimal.⁵²

The *Concept of the Law on Ratification of the Disabilities Convention* asserted that because of inaccessible social environments, the rights of people with disabilities are commonly violated.⁵³ It claimed that Mongolian laws are consistent with obligations under the *Disabilities Convention*, but observed that cohesion between applicable laws and clarity of the procedural rules related to implementing the treaty rights may need to be ensured.⁵⁴ Furthermore, while the *Concept* noted that the *Convention's* implementation would have significant financial implications,⁵⁵ it justifies this by observing that obligations concerning economic, social and cultural rights are

⁵⁰ Хөгжлийн бэрхшээлтэй хүмүүсийн эрхийн тухай конвенцийг соёрхон батлах тухай [Law to Ratify the UN Convention on the Rights of Persons with Disabilities] (Mongolia) adopted on 19 December 2008 (*Law to Ratify the Disabilities Convention 2008*).

⁵¹ Secretariat of the Parliament of Mongolia, *Plenary Session Records* (19 December 2008) 79.

⁵² Only a delegation from the NHRCM participated in the first session of the Ad Hoc Committee. See Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, *Documents of the First Session: List of Participants*, UN Doc A/AC.265/INF/1 (July 2002)

<<http://www.un.org/esa/socdev/enable/rights/adhocmeetaac265inf1e.htm>>.

⁵³ Government of Mongolia, *Concept of the Law on the Ratification of the UN Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention*, 3 March 2008, para 4, item 1.

⁵⁴ *Ibid* para 10.

⁵⁵ *Ibid* para 9.

progressively achievable.⁵⁶ The *Concept* also claims that increased economic and social participation of people with disabilities, which the proposed treaty action is expected to stimulate, will contribute to the economy.⁵⁷ Finally, the government predicted that the proposed ratification will enable Mongolia to benefit from international cooperation and development, which the *Convention* will foster.⁵⁸

On ratification, as was usual for Mongolia, Parliament adopted two brief laws, endorsing the ratifications of the *Disabilities Convention* and the *Optional Protocol*.⁵⁹ The law provides that:

Hereby, as introduced by the Government, accession of Mongolia to the *Convention on the Rights of Persons with Disabilities* that is adopted by the UN General Assembly on 13 December 2006, is ratified.⁶⁰

As discussed in Chapter Three, article 33 of the *Convention* requires the states parties to establish or designate a set of institutions that coordinate and monitor its domestic implementation.⁶¹ On ratification, Mongolia failed to meet the requirements of article 33 of the *Convention*. Moreover, Mongolia failed to publish the *Disabilities Convention* and the *Optional Protocol* in the *State Gazette*, obstructing them from taking the force of law in the Mongolian legal order. This noncompliance is still present as of June 2017. The most detrimental implication of this failure is that Mongolian courts cannot apply *Convention* norms in deciding cases.

B Domestic legal reforms

As discussed, Mongolian disability laws and policies had been reformed prior to the ratification of the *Disabilities Convention* in 2006-8. After ratification, the development of disability policy became relatively stagnant. However, since 2012, the Mongolian government intensified its efforts to improve the livelihood and social participation of people with disabilities and implementing the *Disabilities Convention*. Home care service for people with disabilities and elderly people was introduced,⁶² community

⁵⁶ Ibid.

⁵⁷ Ibid para 8.

⁵⁸ Ibid para 9.

⁵⁹ The *Convention* and the *Optional Protocol* have been adopted separately. But, the wording of the two laws ratifying the instruments is identical.

⁶⁰ *Law to Ratify the Disabilities Convention 2008* art 1 (my translation).

⁶¹ See Section II(A) of Chapter Three.

⁶² General Administration of Social Welfare and Services, *Resolution No 189 of 2012*.

centres for people with disabilities were established in each provincial capital and districts of Ulaanbaatar city,⁶³ and disability specialists and professionals were trained.⁶⁴ In 2013, an early intervention procedure to diagnose the disability of a child, which I will discuss below, was introduced. Significant institutional reforms were undertaken. For the first time in Mongolia a designated disability unit — the Division for Development of People with Disabilities (the Disabilities Division) — was established in the Ministry of Population Development and Social Protection (the Ministry of Social Protection), in September 2012.⁶⁵ In October 2012, the Ministry of Social Protection formed an *ex-officio* disability advisory council. The Council, chaired by the Vice Minister, consisted of 27 members, representing government agencies, the NHRCM, and DPOs.

In August 2012, the National Centre for Training and Rehabilitation, a core disability agency of the Ministry of Social Protection, was also reformed.⁶⁶ Rebranded as the National Centre for Rehabilitation and Development of People with Disabilities, the Centre shifted its focus to the social participation of people with disabilities. The Centre established two new sections, the Social Participation and Cooperation Section and the Early Intervention Section. While the former section promotes positive social attitudes to disability and social participation of people with disabilities, the latter researches a locally appropriate method of diagnosing disability on the basis of a social model of disability.⁶⁷ For decades, the Centre's activities have been restricted to vocational training of people with disabilities, and production and provision of some type of prosthesis. Recently, the conventional areas of the Centre's functions were expanded with socially-focused components. Starting from 2013, for example, the Vocational

⁶³ Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities: Initial Report Submitted by Mongolia under article 35 of the Convention*, UN Doc CRPD/C/MNG/1 (3 July 2013) 46 [194].

⁶⁴ Ibid 31 [101], 38 [144], 40 [157].

⁶⁵ Prior to the Disabilities Division, disability policy remained as one of several responsibilities of a single official at the Ministry.

⁶⁶ Interview with Narantuya Badarch, Director, National Centre for Rehabilitation and Development of People with Disabilities (Ulaanbaatar, 03 June 2013).

⁶⁷ By the time of fieldwork in June 2013, the Early-Phase Diagnosis Sector was not operational.

Training Section offered a training program on social participation of people with disabilities for disability advocates, people with disabilities and family members.⁶⁸

The *Disabilities Convention* often came into policy discussions. In August 2013, the government action plan to implement the *Disabilities Convention* in 2013-16 was adopted.⁶⁹ The action plan outlined 33 activities, which were divided into five areas, such as legal environment and statistics of people with disabilities, medical and rehabilitation service, educational service and training of disability specialists, employment and accessible social environment, and social, political, cultural and sport participation of people with disabilities. The most notable activities included the drafting of a law protecting the rights of people with disabilities,⁷⁰ monitoring of the implementation of disability laws and policies,⁷¹ adoption of ICF of WHO in a locally appropriate manner,⁷² drafting of a national policy to promote the employment of people with disabilities⁷³ and establishment of centres for development of children with disabilities.⁷⁴ Interestingly, in contrast to the *Convention*'s avoidance of prevention and rehabilitation, the action plan emphasised prevention from disability.⁷⁵ I will return below to Mongolia's emphasis on prevention from a disability as a strategy to implement the *Convention*.⁷⁶

Mongolian governments have continued supporting international initiatives to promote the rights of people with disability. In 2015, Mongolia ratified the *Marrakesh Treaty*⁷⁷ adopted by the World Intellectual Property Organisation (WIPO) concerning access to published works for visually impaired persons.⁷⁸ In March 2014, the government

⁶⁸ Interview with Naran TUYA Badarch, Director, National Centre for Rehabilitation and Development of People with Disabilities (Ulaanbaatar, 3 June 2013).

⁶⁹ Government of Mongolia, *On Approving the Implementation Plan of the [Disabilities] Convention*, Resolution No 281 of 2013 (3 August 2013).

⁷⁰ Government of Mongolia, *On Approving the Implementation Plan of the [Disabilities] Convention*, Decree No 281 of 2013 (3 August 2013) app 1, item 1.

⁷¹ Ibid item 2.

⁷² Ibid item 5.

⁷³ Ibid item 29.

⁷⁴ Ibid item 9.

⁷⁵ Ibid items 11, 16.

⁷⁶ See Part IV of Chapter Eight and Part V of Chapter Ten.

⁷⁷ *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, opened for signature 27 June 2013, WIPO Lex No: TRT/MARRAKESH/001 (entered into force 30 September 2016).

⁷⁸ Хараагүй, харааны бэрхшээлтэй эсхүл хэвлэмэл бүтээл унших бэрхшээлтэй хүмүүст зориулан хэвлэн нийтлэгдсэн бүтээлийг хүртээмжтэй болгох тухай Марракешийн гэрээг соёрхон батлах

endorsed the third Asian and Pacific Decade of Persons with Disabilities and the program of action, the *Incheon Strategy to 'Make the Right Real' for Persons with Disabilities in Asia and the Pacific*.⁷⁹ At the endorsement ceremony, which brought more than 800 participants from across the country, high-level politicians pledged their commitment for the Decade. The UN Economic and Social Commission for Asia and the Pacific noted such political commitment as:

The event demonstrated highest-level political commitment to implementing the Incheon Strategy in Mongolia. In addition to the President of Mongolia whose message was delivered by his advisor, pledges were made by the Prime Minister, the Parliament Speaker, the Minister of Population Development and Social Protection and the Minister of Health, all reaffirming the nation's commitment to the Incheon Strategy.⁸⁰

The two core reforms of Mongolia, the early intervention procedure and the *Law on the Rights of a Person with Disability 2016*, will be explored below.

1 Early intervention reform

In 2013 the Mongolian government introduced a system to diagnose the disability of a child and to provide services and support at his/her earliest possible age. Prior to the reform, a child's disability was not diagnosed systematically as there was little need to do so for children, who were not eligible for disability pensions. A disability was diagnosed and treated solely as a medical problem. So-called employability assessment committees determine the degree of disability of adults, which then establish the extent of social care and services available to each person, whereas the diagnosis and treatment of a child with a disability remained as a family responsibility.

tyxай [Law to Ratify the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled] (Mongolia) adopted on 9 July 2015.

⁷⁹ In October 2012, a High-level Intergovernmental Meeting on the Final Review of the Implementation of the Asian and Pacific Decade of Disabled Persons was organised in Incheon, Republic of Korea. The Meeting marked the conclusion of the second Decade (2003-2012) and launched the third Decade (2013-2022). The Meeting adopted the *Ministerial Declaration on the Asian and Pacific Decade of Persons with Disabilities (2013-2022)* and the *Incheon Strategy to 'Make the Right Real' for Persons with Disabilities in Asia and the Pacific*. Comprised of 10 goals, 27 targets and 62 indicators, the *Incheon Strategy* outlines a set of regionally agreed disability-inclusive development goals for the Decade. See United Nations Economic and Social Commission for Asia and the Pacific 'Incheon Strategy to "Make the Right Real" for Persons with Disabilities in Asia and the Pacific' (2012)

<<http://www.unescap.org/sites/default/files/Incheon%20Strategy%20%28English%29.pdf>>.

⁸⁰ UNESCAP, Social Development Division, 'President of Mongolia launches the Incheon Strategy to move towards a disability-inclusive society' (Media release, 1 April 2014)

<<http://www.unescapsdd.org/news/president-mongolia-launches-incheon-strategy-move-towards-disability-inclusive-society>>.

On 7 February 2013, the *Law on the Social Protection of a Citizen with a Disability 2006*, the *Law on Social Welfare 2012*, the *Law on Education 2002*, the *Law on Primary and Secondary Education 2002*, the *Law on Preschool Education 2008* and the *Law on Public Health 2011* were amended. The amendments, which entered into force in January 2014, significantly improved the types and extent of social assistance and services to children with disabilities and established the foundation of an early intervention mechanism. These amendments introduced a system of diagnosing the disability of children on the basis of the social model of disability and providing supports as early as possible. Under this arrangement, the disability of a child will be diagnosed by a committee consisting of medical professionals, social workers and representatives of local schools who will, with the assistance of parents and carers, also determine the development, health and support needs of the child at his/her earliest possible age and the required costs to implement the individualised plan.

In January 2014, Ministers of Education, Health and Social protection issued a joint decree and formed the institutional arrangement to undertake the early intervention mechanism.⁸¹ A central committee, the Committee on Health, Education and Social Protection of Children with Disabilities, was established under the National Centre for Rehabilitation and Development of People with Disabilities in June 2014 and, in the following months, sub-committees were established in the provincial capitals and districts of the capital city. In cooperation with international donors such as the Japan International Cooperation Agency, professionals to implement the early intervention system were trained.⁸² However, the system was not fully operational as of June 2017.

2 *Law on the Rights of a Person with Disability 2016*

As discussed, Mongolia adopted its first disability-specific law in 1995. The *Law on Social Protection of a Handicapped Citizen 1995* was revised in 2005 and changed its title to the *Law on Social Protection of a Citizen with Disability 2005*. The law was

⁸¹ Minister of Population Development and Social Protection, Minister of Education and Science, Minister of Health, *On Establishing Commissions for Health, Education and Social Protection of Children with Disabilities*, Joint Decree: Decree No A/05 of Minister of Population Development and Social Protection (1 January 2014), Decree No A/14 of Minister of Education and Science (1 January 2014), Decree No A/16 of Minister of Health (16 January 2014).

⁸² Japan International Cooperation Agency, *The Project for Strengthening Teachers' Ability and Reasonable Treatments for Children with Disabilities: Outline of the Project*
< <https://www.jica.go.jp/project/english/mongolia/013/outline/index.html>>.

amended in 2008, 2012 and 2013. These amendments increased the scope of social assistance and entitlements of people with disabilities and the requirements of social accessibility. Also, an amendment made to the law in 2013 aimed to bring the definition of person with disability in line with the *Disabilities Convention*.⁸³ Despite these amendments, the law was revised again in 2014 to enable the implementation of the *Disabilities Convention* in Mongolia. The revision was introduced to the Parliament on 6 November 2015 and the *Law on the Rights of a Person with Disability 2016* was adopted on 5 February 2016.⁸⁴ The law does not directly reference the *Convention*. However, the structure, content and language of the law, which abandoned the social welfare focus of its predecessors and embraced human rights, closely resembles the *Convention*.

The *Law on the Rights of a Person with Disability 2016* consists of 12 chapters. Chapter I sets out the general provisions of the law, including the purpose, definitions and guiding principles. The purpose of the law is stipulated as:

The purpose of this law is to fulfil, protect and enable the equal participation in society of a person with disability and to establish the mandates, responsibilities and principles of engagements of government organisations, entities and citizens to these regards.⁸⁵

The law adopts the *Convention*'s definition of people with disabilities,⁸⁶ and defines the concepts of 'discrimination on the basis of disability,' 'reasonable accommodation,' 'universal design,' 'assistive technology' and 'the right to live independently' in a similar fashion to the *Convention*.⁸⁷ The six guiding principles of the law include, intolerance for any form of discrimination against people with disabilities in social participation, respect for independence and the right of people with disabilities to make their own choices, enabling accessible social environments for people with disabilities in taking part in all aspects of social life such as education, employment and socialising, respect for the unique conditions of children with disabilities and enabling them develop their full potentials, delivering the services of community-based inclusive development

⁸³ Хөгжлийн бэрхшээлтэй иргэний нийгмийн хамгааллын тухай [Law on Social Protection of a Citizen with Disability] (Mongolia) adopted on 8 December 2005 art 3.

⁸⁴ *Law on the Rights of a Person with Disability 2016*.

⁸⁵ Ibid art 1 (my translation).

⁸⁶ Ibid art 4(1).

⁸⁷ Ibid art 4.

to people with disabilities in an equal and accessible manner and enabling people with disabilities and their organisations to participate all aspects of policy development, including designing, implementing and monitoring.⁸⁸ Article 2 affirms the supremacy of an international treaty norm over a conflicting provision of domestic law.⁸⁹

Reminiscent of articles 8 and 9 of the *Disabilities Convention*, chapter II addresses two issues, social accessibility and awareness raising, and provides a range of measures in this regard.⁹⁰ Chapter III covers detailed measures to improve the accessibility of the social environment in areas of residential and public construction, public roads and spaces, public transport and communication technology. Article 9 prohibits permitting the use of new public construction that does not comply with disability accessibility standards.⁹¹ In developing these accessibility standards and related policies, the authorities are required to consult with people with disabilities and their organisations,⁹² and a quarter of members of the committees that permit the utilisation of new residential and public buildings must be people with disabilities.⁹³ Article 11 provides a range of measures directed to ensuring the right to information of people with disabilities and developing accessible communication technology.⁹⁴ Furthermore, the law requires the standardisation of Mongolian sign language and Braille.⁹⁵

The following chapters of the law address areas such as education,⁹⁶ employment,⁹⁷ health and medical service,⁹⁸ community-based inclusive development⁹⁹ and social welfare.¹⁰⁰ Chapter IX, which is entitled ‘the other rights and freedoms of people with disabilities,’ covers the right to receive legal assistance,¹⁰¹ political participation,¹⁰² the

⁸⁸ Ibid art 5.

⁸⁹ Ibid art 2.

⁹⁰ Ibid arts 6, 7.

⁹¹ Ibid art 9(5).

⁹² Ibid arts 9(2), 9(3).

⁹³ Ibid art 9(4).

⁹⁴ Ibid art 11.

⁹⁵ Ibid arts 12, 13.

⁹⁶ Ibid ch IV.

⁹⁷ Ibid ch V.

⁹⁸ Ibid ch VI.

⁹⁹ Ibid ch VII.

¹⁰⁰ Ibid ch VIII.

¹⁰¹ Ibid art 27.

¹⁰² Ibid art 30.

right to privacy,¹⁰³ independent living,¹⁰⁴ and the right to participate in sport and cultural activities.¹⁰⁵ Moreover, in a similar way to the *Disabilities Convention*, this chapter addresses the specific issues of women and children with disabilities,¹⁰⁶ and the situation of humanitarian emergency.¹⁰⁷ The measures prescribed under these chapters are generally expansive.

Chapter X stipulates the procedures for diagnosing disability and registering people with disabilities.¹⁰⁸ The law sets out different procedures for diagnosing disability for a child and an adult.¹⁰⁹ For children, it incorporates the early intervention procedure that the above section described. The conventional medicalised process, which is carried out by medical and employability assessment commissions, remained in place for diagnosing the disability of a person over the age of 16.

Chapter XI designates the organisations responsible for the law's implementation, including government,¹¹⁰ the Ministry of Social protection,¹¹¹ an *Ex-Officio* Council,¹¹² governors¹¹³ and legal entities,¹¹⁴ and defines their mandates and responsibilities. The *Ex-Officio* Council is a new body that is primarily responsible for coordinating cross-sectoral activities and developing national disability policies.¹¹⁵ The Council 'may be established under a Prime Minister,'¹¹⁶ and can have a sub-committee in each provincial capital and district of the capital city.¹¹⁷ Although the law is expansive in establishing the rights and entitlements and defining the institutional arrangements, it is rather brief in stipulating enforcement measures. Article 44 affirms the right of a person with disability to bring a complaint to a relevant authority or file a court case, directly or

¹⁰³ Ibid art 31.

¹⁰⁴ Ibid art 32.

¹⁰⁵ Ibid arts 33, 34, 35.

¹⁰⁶ Ibid arts 28, 29.

¹⁰⁷ Ibid art 36.

¹⁰⁸ Ibid ch X.

¹⁰⁹ Ibid art 37.

¹¹⁰ Ibid art 39.

¹¹¹ Ibid art 40.

¹¹² Ibid art 41.

¹¹³ Ibid art 42.

¹¹⁴ Ibid art 43.

¹¹⁵ Ibid art 41(1).

¹¹⁶ Ibid.

¹¹⁷ Ibid art 41(4).

through a representative, in order to restore a violation of a right protected by the law.¹¹⁸ In general terms, article 45 stipulates that such cases will be decided in accordance with applicable laws.¹¹⁹

The law aligns with the *Disabilities Convention*. However, it has some features that seemingly stand at odds with the *Convention*. For example, some provisions of the law are articulated in a way that highlights a physical and functional limitation of people with disabilities. Article 33(1) provides that ‘sport games and competitions involving a person with disability shall be suited to her/his capability.’¹²⁰

Furthermore, the way that the law defines some concepts such as ‘reasonable accommodation’ differs to that of the *Convention*. The concept is defined in the *Convention* as ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.’¹²¹ In contrast, the *Law on the Rights of a Persons with Disability 2016* defines the concept as ‘equipment, material, tools, software, environment and services that are critically important for people with disabilities in exercising their human rights and freedoms on an equal basis with others.’¹²² In this definition, ‘reasonableness’ is understood to be attributed to necessary adjustments and modifications, meaning that such arrangements must fit a person with disability. As such, the concept of reasonable accommodation lost its uniform meaning in laws of Western countries¹²³ — that is any change to a job or work environment not imposing a disproportionate and undue burden to a duty-bearer — in the Mongolian law.

Despite the promise that the *Law on the Rights of a Persons with Disability 2016* was designed to translate the *Convention* in the context of Mongolia, the law does not

¹¹⁸ Ibid art 44.

¹¹⁹ Ibid art 45.

¹²⁰ Ibid art 33(1).

¹²¹ *Disabilities Convention* art 2.

¹²² *Law on the Rights of a Person with Disability 2016* art 4(1)(3) (my translation).

¹²³ See *The Concept of Reasonable Accommodation in Selected National Disability Legislation*, Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, UN Doc A/AC.265/2006/CRP.1 (7 December 2005) <<http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm>>.

properly respond to the *Convention*'s requirement to designate or establish institutions to coordinate cross-sectoral activities and to monitor the rights implementation of people with disabilities and to monitor. The law implies that the above described *Ex-Officio* Council is intended to perform cross-sectoral coordination. Moreover, the law does not confer a formal and explicit mandate to monitor the law's implementation either to the NHRCM or to DPOs. Surprisingly, the NHRCM — Mongolia's NHRI, which de facto monitors the rights situations of people with disabilities — does not have a role. The law confers several service delivery roles for DPOs.¹²⁴ It also stipulates that government and the Ministry of Social Protection 'will support, cooperate and provide guidance to DPOs,' which seemingly suggest an understanding of the relationship between a government and civil society organisations in socialist time.¹²⁵

IV THE LIMITS OF COMMITMENT TO THE *DISABILITIES CONVENTION*

A *Mongolian laws and the Disabilities Convention*

When ratifying, Mongolia argued that its domestic laws were compliant with the *Disabilities Convention*. A UN legal expert, who assessed the compatibility between Mongolian laws and the *Convention* in 2010, shared this view and wrote:

Mongolian laws reflect the rights of persons with disabilities according to the *CRPD* recommendations. For most parts of the *Convention*, the Mongolian laws can be viewed as either being in phase with the mandates of the *Convention* or capable to reach those levels either through a better implementation and/or additional actions.¹²⁶

Although Mongolian disability laws and policies had recognised the social attributes of disability since the mid-1990s and the *Law on the Rights of a Person with Disability 2016* embraced human rights and freedoms, in many areas of law, the underlying approach to disability does not fully align with the human rights approach to disability. Disability of a person over the age of 16 is diagnosed by employability assessment commissions and is treated as a medical condition. Despite the legislative changes directed to improving the social participation of people with disabilities, social welfarism is still a dominant feature in Mongolian disability policy.

¹²⁴ *Law on the Rights of a Person with Disability 2016* arts 7(1)(5), 12(3), 16(3), 23(2), 32(6), 40(4).

¹²⁵ *Ibid* arts 39(1)(4), 40(2).

¹²⁶ Christophe Casaubon, 'For a Better Economic and Social Integration of Persons with Disabilities in Mongolia: Current Situation and Perspectives' (United Nations Development Program, 2010) 4.

Unlike in Australia, social relationships are not heavily regulated in Mongolia. In many areas of life that are covered by the *Disabilities Convention*, such as equal recognition before law, access to justice, personal integrity, family and reproductive rights or property rights of people with disabilities, Mongolian laws do not provide any guidance or, on some occasions, only provide general principles. As discussed, Mongolian laws are generally meagre in formulating procedural rules for exercising the rights or mandates established. For example, the central and sub-committees of health, education and social protection of children with disabilities were established to implement early intervention reform. Yet, according to local actors, the applicable laws failed to clearly define the funding of the committees as well as the implementation of the individualised development plan for children with disabilities.

Mongolia's commitment to the *Disabilities Convention* is also limited by lack of understanding of the philosophy and concepts of the *Convention*. For example, despite the *Convention*'s disapproval of prevention of disability, the government action plan to implement the *Disabilities Convention* in 2013-16 sees prevention as an approach to deal with disability issues.¹²⁷ The plan reflected two activities on this regard, conduct of awareness-raising campaigns on the importance of early diagnosis and prevention from disability,¹²⁸ and an annual celebration of Mongolia's ratification of the *Disabilities Convention* on 13 May under the theme of 'prevention from disability.'¹²⁹ In reviewing Mongolia's implementation report in April 2014, the CRPD Committee criticised its adherence to the concept of disability prevention. The concluding observation stated that:

The Committee is concerned about negative attitudes towards persons with disabilities in the State party, as manifested in everyday language, the media and events such as "disability prevention day", which represents a concept that is contrary to the principles of the *Convention*. The Committee notes that the measures for raising awareness of issues concerning the rights of persons with disabilities are inadequate, as even persons with disabilities and their families, let alone the general public and the relevant professionals, are not exposed to such issues. Furthermore, the Committee is concerned that the disability issue in general appears to be confined to physical disabilities

¹²⁷ Government of Mongolia, *On Approving the Implementation Plan of the [Disabilities] Convention*, Decree No 281 of 2013, 3 August 2013.

¹²⁸ Ibid item 10.

¹²⁹ Ibid item 16.

and that inadequate attention is accorded to intellectual and psychosocial disabilities.¹³⁰

Similarly, the 2013 amendment to the *Law on Social Protection of a Citizen with Disability 2006* was made in order to bring the definition of a person with disability in line with the *Convention*. But the CRPD Committee did not share this view. The concluding observations of the CRPD Committee addressed to Mongolia state that:

The Committee is concerned that while the State party adheres to the World Health Organisation (WHO) concept of disability with a focus on condition arising from inherent personal or medical impairment, it overlooks interactions with environmental factors. While the *Convention* recognises an evolving concept of disability, the State Party appears to be trapped by the concept of a 'permanent disability'.¹³¹

As such, clarity, comprehension and coherence problems in disability laws obstruct Mongolia's commitment to implement the *Disabilities Convention*.

B *Faulty implementation*

Although Mongolian disability legal and policy developments are promising, the actual implementation of those impressive laws can be challenging.¹³² As mentioned, in 2006 Mongolia adopted the *National Program to Support People with Disabilities (2006-12)* and the *Sub-program to Promote the Social Participation of Children with Disabilities (2006-13)*. The outcomes of these two policies were assessed in 2013 and the report found that implementation of the two policies was insufficient. The report identified the reasons for poor implementation as:

¹³⁰ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Mongolia*, 199th mtg, UN Doc CRPD/C/MNG/CO/1 (13 May 2015) para 14 (*CRPD Committee Concluding Observations on Mongolia 2015*).

¹³¹ *CRPD Committee Concluding Observations on Mongolia 2015* para 5.

¹³² See, eg, Lucy Thompson 'People with disabilities: How much support does Mongolia really give them?' *The UB Post* (online), 9 May 2016 <<http://theubpost.mn/2016/05/09/people-with-disabilities-how-much-support-does-mongolia-really-give-them/>>. Thompson writes:

...[T]here are in fact numerous laws in play to ensure the protection of people with disabilities. ...Even so, as good as this seems it does not translate to reality. Despite financial aid, the State Social Welfare Office estimates that roughly 80 percent of people with disabilities are living below the poverty line, and pointedly, less than 20 percent have a job even though employment quotas have been established. Many companies prefer to opt out of this and pay a fine to the Social Welfare Fund rather than going to the trouble of making the workplace accessible for people with disabilities, a point which demonstrates that Mongolia's government simply doesn't have the mechanisms to implement its policies. ... It is clear to see that many of the problems faced by people with disabilities stem from Mongolia's infrastructure falling short in many areas.

The implementation of the program was inadequate due to such reasons as poor policy coordination and monitoring mechanism, lack of a specified budget, poor understanding of the issue on the part of the management of local organisations responsible for developing and implementing policies related to persons with disabilities, scant information about the subject available to them, insufficient knowledge and skills of the personnel working in this field as well as high rate of personnel turnover.¹³³

The early intervention reform promises significant changes in the lives of children with disabilities. Although the central and sub-committees on health, education and social protection of children with disabilities were established and some efforts were taken to train committee members and professionals, such committees were not fully operational as of June 2017. Regarding the reform, the Mongolian civil society report to the CRPD Committee noted that:

This commission consists of representatives of three different ministries, the Ministry of Health, the Ministry of Education and the Ministry of Population Development and Social Welfare, but has not yet formally commenced its activity. Although the new system is better than the previous medical model and improvement in the assessment of children can be expected, there is no indication what will happen with the results of the assessments.¹³⁴

V CONCLUSION

Seen through an instrumental lens, Mongolia's efforts to implement the *Disabilities Convention* are commendable. Following the *Convention's* ratification, the policy approach of the Mongolian government has seemingly shifted from social welfare to development of people with disabilities. The policy developments were supported by significant institutional reforms. Mongolia adopted a plan to implement the *Convention* in 2013-16. It subsequently introduced an early intervention mechanism, which is perceived as an attempt to apply the social approach to disability in Mongolia. Since the *Convention* ratification, Mongolian disability laws were frequently amended, focusing on improved social participation and increased welfare benefits. Moreover, in order to fully incorporate the *Disabilities Convention* in domestic law, Mongolia adopted the *Law on the Rights of a Person with Disability 2016*.

¹³³ Ministry of Population Development and Social Protection, Assessment Report: *National Program to Support People with Disabilities* and the *Sub-program to Promote the Social Participation of Children with Disabilities* (2013) 43 quoted in Disabled People's Organizations in Mongolia, *Submission to the CRPD Committee on the Response to the List of Issue on Mongolia* (January 2015) 8.

¹³⁴ Disabled People's Organizations in Mongolia, above n 133, 5.

Meanwhile, there are some issues disparaging Mongolia's commitment to the *Disabilities Convention*. Although Mongolia made notable institutional reforms, such measures does not conform to the institutional arrangement required by article 33 of the *Convention*. Neither the *Law on the Rights of a Person with Disability 2016* responded to the required domestic implementation and monitoring mechanisms. Mongolia failed to publish the *Disabilities Convention* and the *Optional Protocol* in the State Gazette for almost a decade, effectively nullifying the legal force of these treaties in the Mongolian jurisdiction.

Like Australia, human rights approach to disability is less understood and discussed in Mongolia. Despite the recent improvements, the underlying philosophy of Mongolian disability laws largely exhibits the civil disability model from Rioux's typologies. Disability is framed as an unchanging medical condition and people with disabilities are classified on the basis of their employability. Prevention remains as a main strategy in disability policy. A sense of charity drives provisions of social welfare measures. While the text of the *Law on the Rights of a Person with Disability 2016* indicate its close link with the *Disabilities Convention*, some key concepts of the treaty such as reasonable accommodation, personal integrity or personal mobility were misconceived or omitted altogether in Mongolian laws. The early intervention reform optimistically attempted to integrate the social approach to disability in diagnosis and treatment of children with disabilities. However, as of January 2017, the system has not been functional due to imprecise procedural rules, uncertainty of funding and lack of infrastructure for implementing the reform.

CHAPTER NINE

THE *DISABILITIES CONVENTION* IN MONGOLIA: A CONTEXTUAL STORY

I INTRODUCTION

On a cold, windy day in November 2006, the NHRCM and the Representative Office of the *Amici di Raoul Follereau* Association (AIFO) organised a workshop on the *Disabilities Convention* for the members of the DPO Federation, representing all major DPOs and coming from Mongolia's 21 provinces. At the training, I spoke of the draft *Convention* and the implications of ratified international treaties in the Mongolian legal order. The excitement and the interest of the audience in these topics were intense. The speakers at the workshop were bombarded with questions and learnt from energetic debates that came in occasionally among the participants. We brainstormed strategies to promote the awareness of the *Convention* and advocate for its ratification following the UN adoption. The workshop, which started 10.00 am, was scheduled to finish at 5.30 pm, but continued until about 7.30 pm. This was the beginning of a series of training programs and events to support the ratification of the *Convention*, in which I had actively participated until I took a temporary leave of the Commission in June 2008.

In the course of these events, my responsibilities mostly involved the legal side of the processes, such as drafting laws, writing a handout explaining the *Convention* norms, talking about the relevant international and domestic laws to various audiences and monitoring the implementation of Mongolian disability laws. My attention was on the 'instrumentalist wins' of the *Convention*: ratification and legal reform. Meantime, the enthusiasm of Mongolian DPOs to these events as well as to the *Convention* fascinated me. A decade later, as a result of this research, I came to understand that such reaction was a sign of a deeper social change that was under way. This Chapter tells this story demonstrating the perspectives of local actors on the impact of the *Disabilities Convention* in Mongolia. In contrast to the instrumentalist approach focused on state responses and law reforms, the contextual story presented in this chapter pays attention on the broader effects of the *Convention* encompassing legal and extra-legal impacts. This approach also invites us to scrutinise deeper how a particular action that seemingly

implements a human rights treaty came into effect, avoiding from assuming a direct connection between the act and the treaty.

The Chapter has two main parts. Part II explores how Mongolia's recent legislative changes in the disability area were achieved. I argue that the *Disabilities Convention* triggered legal change in Mongolia before it entered into force, indeed before it was ratified by Mongolia. I will then explore the drafting of the *Law on the Rights of a Person with Disability 2016* and the early intervention reform, the two most important measures for implementing the *Convention*. Part III focuses on the non-legal impact, illustrating significant social and political changes that the *Disabilities Convention* effected in Mongolia. By creating hope and spreading a new, empowering way of constructing disability, the *Convention* galvanised local actors. The *Convention* also reminded Mongolian authorities of the dire living situations of people with disabilities and created momentum to change laws and policies. Part IV discusses the significant changes that I observed in Mongolian DPOs five years after I worked closely with them. As in Australia, the *Disabilities Convention* significantly influenced the social fabric of Mongolia.

II CONTEXTUAL STORIES OF MONGOLIAN LEGAL REFORMS

A *The first phase (2006-8)*

Chapter Eight described that Mongolian disability law and policies changed significantly in 2006-8. Having closely engaged in the process, I observed that the *Disabilities Convention* influenced these changes, even though the treaty was not legally binding on Mongolia. Inspired by developments around the *Convention* at the international level, Mongolian actors started organising events to promote the rights of people with disabilities. These events played a critical role in creating networks among local actors, who then made changes to laws and policies that I described in Chapter Eight.¹

In 2005-9, the Presidential Secretariat and the NHRCM jointly organised national human rights conferences under the auspices of President Enkhbayar Nambar. These conferences were an advocacy strategy that took place over a whole year, devised by the

¹ See Parts II and III of Chapter Eight.

resource-limited NHRCM in order to advance a human rights cause by harnessing the influence and support of President Enkhbayar, the most powerful political figure at that time. The Commission targeted one human rights issue each year, organising most of its annual activities around that issue. At the end of the year — close to International Human Rights Day — a national conference was organised, bringing together several hundred delegates from government, civil society and the private sector. The conferences adopted a set of recommendations on the chosen issue, of which the implementation was monitored by the NHRCM and was reported on at the following national conference.

In relation to the *Disabilities Convention*, in April 2006 the Presidential Secretariat and the NHRCM agreed to devote the 2006 national conference to the rights of people with disabilities and approached the DPO Federation to jointly organise the national conference.² A flurry of activities was undertaken in the course of the conference. In May 2006 two studies concerning social protection and employment of people with disabilities were commissioned. The findings of the research informed the discussion and recommendations of the national conference. In May and September 2006, roundtables were held with key stakeholders to identify the main challenges to the rights implementation of people with disabilities. The Commission also organised extensive public outreach activities such as TV shows, public lectures and publications.

The Mongolian Representative Office of the *Amici di Raoul Follereau Association* (AIFO) contributed greatly to the process.³ Commencing its activities in Mongolia in 1992, the AIFO was an early donor to the Mongolian disability sector, which promotes community-based rehabilitation of people with disabilities.⁴ Unlike most other international organisations, AIFO worked in a close partnership with the government, co-implementing a national program called the *Tegsh Duuren* with the

² Interview with Oyunchimeg Purev, Commissioner, National Human Rights Commission of Mongolia (Ulaanbaatar, 31 May 2013).

³ See Italian Raoul Follereau Association, *About AIFO* (2013) <<http://english.aifo.it/gen/index.htm>>.

⁴ A community-based rehabilitation strategy (CBR) was initiated by WHO following the Declaration of Alma-Ata in 1978 in an effort to enhance the quality of life for people with disabilities and their families, to meet their basic needs and ensure their inclusion and participation. While initially a strategy to increase access to rehabilitation services in resource-constrained settings, CBR is now a multi-sectoral approach working to improve the equalisation of opportunities and social inclusion of people with disabilities while combating the cycle of poverty and disability. See World Health Organisation, *Disability and Rehabilitation: Community based Rehabilitation* (2017) <<http://www.who.int/disabilities/cbr/en/>>.

Ministry of Health.⁵ To implement the *Tegsh Duuren* program, the Ministry created a nation-wide network of medical professionals, which was headed by a central program committee established at the Ministry of Health. The National Centre for Rehabilitation and Development of People with Disabilities serves as the *Tegsh Duuren* program administration. At the local level, provincial governors established *ex-officio* program committees. The *Tegsh Duuren* program network allowed the AIFO an extensive reach to every major administrative unit in Mongolia.

In August 2006, as the UN Ad Hoc Committee adopted the draft *Convention* and the *Optional Protocol*, the AIFO and DPI International organised a week-long training program in Ulaanbaatar. For many disability and human rights advocates, including myself, it was the first opportunity to get a systematic knowledge of the *Convention*'s draft. The training complemented the national conference and a constructive partnership quickly developed between the Presidential Secretariat, the NHRCM, the DPO Federation and the AIFO, which together organised many further activities and events on the issue. During the training the NHRCM and the AIFO agreed to organise a series of trainings on the *Disabilities Convention* and the effects of international law on the Mongolian legal system for local actors. In 2006-10, AIFO funded the NHRCM's disability advocacy, including a campaign for ratification of the *Convention*.

On 8 December 2006, the national human rights conference was organised entitled 'The Rights of Persons with Disabilities'. In February 2007, the NHRCM conducted an examination of the National Centre for Psychological Health, the only psychiatric institution in Mongolia, which housed more than 400 in-patients, including more than 200 people who lived there for an indefinite period. In April 2007, on the basis of evidence gathered throughout the year, the Commission reported to Parliament on the rights of people with disabilities.⁶ The report exposed numerous inconsistencies

⁵ Activities carried out under the *Tegsh Duuren* program included promoting knowledge of CBR among medical professionals, training rehabilitation specialists and volunteers to provide services for people with disabilities, establishment of community health centres that inform and assist people with disabilities with regard to CBR, provision of funds to orthopaedic factories in rural areas, training of local teachers on the concept and strategies of inclusive education, establishment of peer-support groups of people with disabilities, provision of loans to small businesses run by people with disabilities and capacity development of DPOs.

⁶ National Human Rights Commission of Mongolia, Report on Human Rights and Freedoms in Mongolia (2007) <<http://www.mn-nhrc.org/eng/main2/188/>>. I was the principal author of Chapter III of the 2007 report entitled 'the rights implementation of persons with disabilities in Mongolia.'

between international human rights treaties and Mongolian disability laws and discussed the practical challenges in implementing the rights of people with disabilities. The Commission made ten recommendations, including ratifying the *Disabilities Convention* and its *Optional Protocol*. Meanwhile, the DPO Federation and the Presidential Secretariat drafted amendment proposals to several disability laws.⁷ As such, several laws concerning people with disabilities were amended in August 2007 and June 2008.⁸

Probably because of Mongolia's history of a strong, but generous state at least until the 15th century, the influence of Buddhism until the early 20th century and, most importantly, a legacy of socialism until the 1990s, there seems a common sense among Mongolians that caring for the most vulnerable citizens is an essential attribute of good government. Despite the ruling party,⁹ Mongolian governments have consistently supported people with disabilities and have increased social welfare assistance. In steering Mongolian government actions in the area, therefore, what was needed was perhaps only a reminder. The *Disabilities Convention*, as well as global and local events that occurred in relation to the *Convention*, reminded Mongolian actors about people with disabilities and the disadvantages that they face in everyday life. These actions also brought influential local actors together and galvanised action. Seven laws were amended in order to enable the social participation of people with disabilities.¹⁰ The *Comprehensive National Development Strategy based on Millennium Development Goals 2008* developed on the initiative of President Enkhbayar paid special attention to the issues of people with disabilities and contained a detailed set of actions on the issue.

⁷ In 2005, the DPO Federation, funded by the AIFO, drafted a revision of the *Law on Social Protection of a Citizen with Disability 2005*. Although the law was revised in 2006, most suggestions of the DPO Federation were not taken up. The national conference and the resultant conditions enabled the DPO Federation to get the relevant laws to be amended as it once suggested.

⁸ See discussion in Section II of Chapter Eight.

⁹ As discussed in Chapter Five, the two major political parties of Mongolia — the MPP and the Democratic Party — do not differ much in their philosophy for most social and economic issues. See Section III(B) of Chapter Five.

¹⁰ These laws include, the *Law on the Elementary and Secondary Education 2002*, the *Law on Public Roads 1998*, the *Law on Public Transportation 1999*, the *Law on Income Taxation of Business Entities 2006*, the *Law on Physical Education and Sports 2003*, the *Law on Social Welfare 2005* and the *Law on Social Protection of a Citizen with Disability 2005*.

B *The second phase (2012-16)*

As a result of the 2008 Parliament election, an MPP-led coalition government was formed. In the 2008-12 election cycle, Prime Minister Bayar Sanjaa headed the government from 29 June 2008 to 29 October 2009, followed by Prime Minister Batbold Sukhbaatar from 29 October 2009 to 10 August 2012. Although the Bayar government ratified the *Convention*, disability policy had little development during these MPP-led governments. Instead, these governments were focused on moving forward a nationally-significant mining project, which were delayed due to political battles. The government's inaction seemed to have caused despair among disability activists. A disability activist, who wanted to keep his identity confidential, wistfully said to me that 'unfortunately, energy that we had during the national conference was gone. We [the institutions] should get together again now and bring back that atmosphere.'¹¹

In contrast, a Democratic Party-led coalition government, which was formed after the 2012 Parliament election, has been more active in the disability area. The government also saw two Prime Ministers, Prime Ministers Altankhuyag Norov from 10 August 2012 to 5 November 2014 and then Prime Minister Saikhanbileg Chimed from 21 November 2014 to 7 July 2016. The early intervention reform and the *Law on the Rights of a Person with Disabilities 2016*—the two major disability reforms that Mongolia made in the last decade—were made under these governments. However, these reforms were not achieved because the Mongolian government was committed to implementing its obligations under the *Disabilities Convention* in the first instance. Rather, certain individuals who were committed to making changes in the lives of people with disabilities appeared to have been more important. This was indicated by some research participants. For example, Narantuya Badarch, who has worked in the sector for more than a decade as an officer of the Ministry of Health and director of National Centre for Rehabilitation and Development of People with Disabilities, noted that:

The recent changes in the disability sector could still happen, in the absence of the *Convention*. But, the *Convention* was important in the process. I

¹¹ Confidential Interview No 1 (Ulaanbaatar, 30 May 2013).

cannot tell exactly in what ways it helped. ...The *Convention* has certainly intensified the process.¹²

As Chapter Five indicated, international and domestic human rights laws are not taken into account in Mongolian policy-making consistently and systematically. The following sections explore how these reforms were achieved.

1 *Law on the Rights of a Person with Disability 2016*

In February 2012, before the 2012 Parliament election, the Democratic Party held a nation-wide discussions and developed a policy document called ‘*Mongolians-2020*’ that outlines the actions for putting the Party’s vision of ‘human-centred development’ into practice.¹³ ‘*Mongolians-2020*’ policy proposals provided a base for the Party’s election platform and it then became the agenda of the Democratic Party-led coalition government in 2012-16.¹⁴ At the same time, the impressive growth of the Mongolian economy in 2010-13 enabled the Altankhuyag government to expand its administration. The former Ministry of Social Protection and Labour divided into two Ministries — the Ministry of Population Development and Social Protection and the Ministry of Labour. In August 2013, the Division for Development of People with Disabilities was established under the Ministry of Social Protection. Reflecting the focus of a new government, all social policy agencies took the term ‘human development’ in their titles.

A majority of disability activists that I interviewed observed that the establishment of the Disabilities Division was the most important outcome of Mongolia’s ratification of the *Convention*. Nonetheless, the designation and status of the Division has been understood differently. Some actors explained that the Disabilities Division was established in response to their demand to implement article 33 of the *Disabilities*

¹² Interview with Narantuya Badarch, Director, National Centre for Rehabilitation and Development of People with Disabilities (Ulaanbaatar, 3 June 2013).

¹³ Democratic Party, *Mongolians-2020 election platform* (5 June 2012). Several research participants indicated that, compared to the previous the Bayar and the Batbold governments, the Altankhuyag government was more committed to international human rights law. However, in my view, such an observation was true in the policy areas of the Ministry of Justice and Home Affairs, of which the key leaders, including the Minister and State Secretary, were lawyers with significant exposure to international human rights law. In social policy areas, international law has been rarely invoked.

¹⁴ Parliament of Mongolia, *On Approving the 2012-2016 Program of the Government of Mongolia*, Resolution No 37, 18 September 2012.

Convention.¹⁵ Other people thought the Division was an organic development, which reflected the commitment of the Altankhuyag government to the concept of human development.¹⁶ The division officials too had different views on the Division's status and designation. A head of the Division, Batdulam Tumenbayar, was inclined to say that the designation of her division was to organise the development and implementation of disability policies across different ministries.¹⁷ Batdulam considered that the placement of the Division under the Ministry of Social Protection was a mistake, hindering its intended role of coordinating multi-sectoral agenda. In contrast, an officer of the Division saw that her responsibility was to implement the policies of the Ministry and the Ministry leadership.¹⁸

Nevertheless, the Division did not limit itself to Ministry's portfolio in practice. It drafted the government plan to implement the *Disabilities Convention* in 2013-16, which included the revision of the *Law on Social Protection of a Person with Disability 2006* in the light of the *Convention*. In July 2014, a working group was established at the Ministry of Social Protection to draft the law's revision. Adding momentum to the effort, in October 2014 AIFO received funding from the European Union (EU) to promote the implementation of the *Disabilities Convention* in Mongolia.¹⁹ Since the adoption of a domestic law incorporating the *Convention* into the Mongolian legal order was one of the three main goals of the EU-funded project, AIFO offered a technical assistance to the Ministry. 'Because a revision of the social protection law was reflected in the government plan, the *Law on the Rights of a Person with Disability 2016*,

¹⁵ Interview with Avirmed Yamkhin, Head, Aivuun NGO (Ulaanbaatar, 11 June 2013), Interview with Gerel Dondov, President, National Association of Blind Citizens (Ulaanbaatar, 04 June 2013, updated via Skype on 12 June 2015), Interview with Tsedelbal Togoogurjav, President, National Association of Organisations of People with Hearing Impairments (Ulaanbaatar, 31 May 2013), Confidential Interview No 1 (Ulaanbaatar, 30 May 2013) [The interviewee holds a senior role at the Ministry of Population Development and Social Protection of Mongolia].

¹⁶ Interview with Chuluundolgor Bat, Head, National Association of Wheelchair Users (Ulaanbaatar, 07 June 2013).

¹⁷ Interview with Batdulam Tumenbayar, Head, Division for Development of People with Disabilities, Ministry of Population Development and Social Protection (Ulaanbaatar, 3 June 2013).

¹⁸ Confidential Interview No 2 (Ulaanbaatar, 3 June 2013) [The interviewee works for the Disabilities Division of the Ministry of Population Development and Social Protection of Mongolia].

¹⁹ Interview with Tulgamaa Damdinsuren, Resident Representative to Mongolia, Amici di Raoul Follereau Association (Ulaanbaatar, 28 May 2013, updated via Skype on 14 January 2015, updated via telephone on 02 February 2017).

although it was effectively a new law, was called the revision until it was adopted,’ explained AIFO Resident Representative Tulgamaa.²⁰

AIFO funded all stages of the drafting of the *Law on the Rights of a Person with Disabilities 2016*, including the expert team to draft the law and an opinion poll concerning the law involving 3000 people with disabilities. The final product clearly reflected the AIFO’s engagement. For example, Chapter IX of the *Law on the Rights of a Person with Disabilities 2016* addresses community-based inclusive development — the main policy area of AIFO’s Mongolian activities²¹ — despite the fact that the *Disabilities Convention* generally shied away from the concept of rehabilitation.

The legal and policy changes in the area of disability of 2012-16 were achieved largely because of the eager staff of the Disabilities Division, not because of top-down treaty implementation. The Division officials, who had worked in the sector for a number of years and most of whom have lived experiences of disability,²² attach great importance to the *Disabilities Convention*. A head of the Disabilities Division, Batdulam Tumenbayar, a physician and the mother of a disabled child, had formerly worked as a *Tegsh Duuren* program manager. According to AIFO Representative Tulgamaa, while going on a road trip to introduce the *Tegsh Duuren* program’s activities to newly appointed Minister of Social Protection Erdene Sodnomzundui, the Minister came to understand the complex nature of disability and social dimensions of disability.²³

After the two unsuccessful appointments to the position of the head of the Disabilities Division, the Minister appointed the *Tegsh Duuren* program manager Batdulam to the position. It was felt that Batdulam was keen to make changes to the disability area within the shortest possible time. ‘I understand that the expectation of DPOs is high. Some DPO leaders want to meet with us regularly. There is also pressure from the

²⁰ Ibid.

²¹ Community-based inclusive development is the renewed concept of community based rehabilitation. The Asia Pacific Development Centre defines community-based inclusive development as ‘the goal to achieve through community based rehabilitation strategy.’ See Asia-Pacific Development Centre on Disability, ‘Community based Inclusive Development: Principles and Practices’ (2012) 1 <<http://www.apcdfoundation.org/?q=system/files/cbid.pdf>>.

²² In May 2013, the Disabilities Division had three officials and two of them had personal experiences of disability.

²³ Interview with Tulgamaa Damdinsuren, Resident Representative to Mongolia, Amici di Raoul Follereau Association (Ulaanbaatar, 28 May 2013, updated via Skype on 14 January 2015, updated via telephone on 02 February 2017).

government to implement the program. We must not let such expectations down,' said Batdulam.²⁴ Most disability activists that I interviewed acknowledged that the Division officials were committed and were willing to cooperate with DPOs.

Relatedly, it seems that a noteworthy aspect of AIFO's persistent efforts in Mongolia is that, in addition to the *Tegsh Duuren* program and funding, AIFO influences the Mongolian disability sector indirectly by nurturing and informing professionals who have important roles in the sector. Like Batdulam and many others, a chair of the National Centre for Rehabilitation and Development of People with Disabilities, Narantuya Badarch, was an officer of the Ministry of Health whose responsibilities included coordinating the *Tegsh Duuren* Program at the Ministry.

2 *Early intervention reform*

An institutional reform at the Ministry of Social Protection, enabled by economic prosperity as well as committed individuals inside and outside of the government produced the *Law on the Rights of a Person with Disability 2016*. By contrast, the early intervention reform was undertaken, to a large extent, as a result of efforts by an influential politician. Oyun Sanjaasuren is a chair of Civil Will Party and has been a Parliament member since 1998. Oyun has held many high-level positions, including as Vice-Speaker of Parliament (between 2004-5), Minister of Foreign Affairs (between 2007-8) and Minister of Environment and Green Development (2012-14). As a mother of a disabled child, Oyun is deeply concerned about the situation of children with disabilities and committed to enabling children with disabilities to get early diagnosis and support. Oyun supports and sit on the boards of two NGOs, the Association of Down's Syndrome and the Association of Parents with Differently-abled Children.

Oyun, her team, and a network created around her official and voluntary roles undertook the early intervention reform. Oyun's advisors at the Parliament and the Ministry of Environment and Green Development, as well as staff of the two NGOs, studied the early intervention practices of various countries. They worked for designing a model that is suitable to the context of Mongolia, drafted the proposals to amend

²⁴ Interview with Batdulam Tumenbayar, Head, Division for Development of People with Disabilities, Ministry of Population Development and Social Protection (Ulaanbaatar, 03 June 2013).

relevant laws, and garnered political support in passing the amendments.²⁵ At the Parliament, the Caucus of Women Parliamentarians also supported the proposal.²⁶ Despite the fact that the reform requires significant funding and infrastructure, the relevant laws were amended in a relatively short time with surprisingly little discussion. Except the two NGOs working closely with Oyun, other DPOs did not have much engagement in the reform, according to disability activists that I interviewed.

Although the early intervention reform is an important attempt to adopt a social approach to disability in Mongolia, the *Disabilities Convention* seemed to have had little relevance in the process. Instead, in designing the system and drafting the amendments to laws, Oyun's advisors studied the practices of some countries and drew on them.²⁷ Not unexpectedly, Sambuu Selenge, a head of the Parents' Association of Children with Disabilities, who contributed actively in the early intervention reform, argued that 'the *Convention* had no impact to Mongolia.'²⁸

III EXTRA-LEGAL EFFECTS OF THE *DISABILITIES CONVENTION* IN MONGOLIA

A *Campaign for ratification of the Disabilities Convention*

Notwithstanding the legal and policy changes, in my view, the most significant effects of the *Disabilities Convention* in Mongolia were felt in the political and social spheres. While working with Mongolian DPOs closely in 2006-8, I saw that the *Convention* galvanised Mongolian disability activists. Since the very first workshop of DPO activists that I described in the beginning of this chapter, many activities to promote the *Convention's* ratification continued to be organised in these years. The 2006 national conference, held in the State Palace on 8 December 2006, was a highlight. For many disability activists, it was the first time that they were able to sit together with politicians in the State Palace, which is a restricted and highly respected venue of the

²⁵ Interview with Oyun Sanjaasuren, Member of Parliament, Minister for Environment and Green Development (Ulaanbaatar, 18 June 2013).

²⁶ In 2012, nine women were elected to the SGH representing different political parties. For the first time, they agreed to form the Caucus of Women Parliamentarians in order to cooperate for selected issues such as mothers, children (including especially children with disabilities), health and social welfare.

²⁷ Interview with Oyun Sanjaasuren, Member of Parliament, Minister for Environment and Green Development (Ulaanbaatar, 18 June 2013).

²⁸ Interview with Selenge Sambuu, Director, Association of Parents with Differently-abled Children (Ulaanbaatar, 29 June 2013).

nation,²⁹ and discuss the challenges that they face in everyday life.³⁰ In such ways, the *Disabilities Convention* galvanised Mongolian actors, who had not been involved in the *Convention*'s drafting.

The adoption of the *Convention* and the *Optional Protocol* was widely celebrated by Mongolian disability activists.³¹ From April 2007, with financial support from AIFO, the NHRCM and the DPO Federation started campaigning for the ratification of the *Disabilities Convention*.³² The campaign's extensive public education activities helped to galvanise ordinary people with disabilities and expand DPOs. The proposal to ratify the *Convention* was tabled in the Parliament in March 2008. A Parliamentary Standing Committee on Social Policy, Education and Science discussed the proposal in May 2008. However, the discussion came to a halt, due to a parliamentary election held on 28 June 2008.

The political commitment for the *Disabilities Convention*'s ratification was clearly present. However, the actual ratification of the *Convention* was influenced by an incidental pretext. The 2008 parliamentary election of Mongolia ended in a tragic riot, which resulted in the declaration of a state of emergency for the first time, causing a tremendous shock to society.³³ In the middle of the social unrest, the Beijing Olympics was held in August 2008 and two Mongolian athletes won the country's first-ever Olympic gold medals. Given the PRC's long-time dismissal of Mongolia's independence, the winning of Olympic medals in Beijing had deep significance to many Mongolians. The nation-wide celebration of these achievements brought thousands of people and politicians together at the Sukhbaatar Square — the nation's main public

²⁹ The State Palace, which is located in the heart of Ulaanbaatar, houses the President, Parliament and executive government of Mongolia.

³⁰ For many ordinary Mongolians, entering into the State Palace is seen as a significant moment. As the main coordinator of the conference, I witnessed that the organisation of the conference in the State Palace was important for many disability activists.

³¹ See Narantuya Ganbat 'What can human rights treaties do for people? The UN Convention on the Rights of Persons with Disabilities in Mongolia' Regarding rights (1 May 2014) <<http://asiapacific.anu.edu.au/regarding-rights/tag/nara-ganbat/>>.

³² Interview with Tsedelbal Togoogurjav, President, National Association of Organisations of People with Hearing Impairments (Ulaanbaatar, 31 May 2013).

³³ An early claim by the MPRP to have won the election resulted in a demonstration on 29 June and the riot peaked two days later. The MPRP headquarter was set on fire, five people were killed and 718 people were arrested. For three days, a night curfew was imposed, armoured vehicles patrolled the main streets of Ulaanbaatar and the mass media was censored. For more information about the riot, see Alan J.K. Sanders, *Historical Dictionary of Mongolia* (Scarecrow Press, 3rd ed, 2010) 370-71.

space located in front of the State Palace. It became an important moment to restore the sense of national unity and relieve the distress and anxiety of society. Later that year Mongolia also won its first-ever gold medal at the Beijing Paralympic Games.

Baatarjav Dambadondog, the Beijing Paralympic gold medallist, immediately became an important figure in disability politics in Mongolia. In October 2008 Baatarjav, requested by several DPO leaders, became President of the United Association of People with Disabilities (the United Association), a new disability peak body formed after the de facto dissolution of the DPO Federation in 2008.³⁴ As President of the United Association, Baatarjav lobbied for ratification of the *Disabilities Convention*. With his reputation, the advocacy succeeded effortlessly at this time and the laws ratifying the *Convention* and the *Optional Protocol* were passed on 19 December 2008. Regarding the process, AIFO's Resident Representative Tulgamaa Damdinsuren said:

We fought for the *Convention's* ratification so hard in the last two years, spending millions of *tugriks*. Yet, Baatarjav's engagement made a huge difference. To politicians, Baatarjav's words were more worthy than our efforts of two years.³⁵

B *Galvanising disability activists*

Due to overseas study, my official engagement with the Mongolian disability sector ended in June 2008. In June 2013, I returned to the sector to undertake fieldwork research and found a few noticeable differences. People with disabilities had become more socially active. The frequency of social events addressed to people with disabilities had increased. Participation of people with disabilities in various public events and competitions started being seen as normal. Moreover, the messages conveyed through various public events organised by DPOs were different from the past. The messages were not so much conventional appeals to sympathy or reminders of a Mongolian tradition of caring for vulnerable people. Instead, social events highlighted the capabilities of people with disabilities and their contributions to society. These events also challenged the traditional assumptions of disability associated with sickness, incapability and ugliness.

³⁴ Due to internal conflicts between member organisations and leadership, the DPO Federation had de facto disbanded by June 2008. However, the DPO Federation claims that it still exists.

³⁵ Interview with Tulgamaa Damdinsuren, Resident Representative to Mongolia, Amici di Raoul Follereau Association (Ulaanbaatar, 28 May 2013, updated via Skype on 14 January 2015, updated via telephone on 02 February 2017).

On 17 June 2013, during my fieldwork in Ulaanbaatar, I attended one such event — the Wheelchair Fashion Show. In the show eighteen models in wheelchairs dressed in designer clothes appeared along with professional models. The event was professionally produced, using the latest technologies of light, sound and visual effects. ‘Tonight, you made an achievement, which many politicians would not achieve for years!’ noted, the Minister for Sports, Culture and Tourism, Oyungerel Tsedevdamba, at the concluding ceremony. She took full responsibility to organise the show in the following year. The USAID, one of the donors of the event, also commented that:

It was not about dressing up the models in wheelchairs, but it was about bringing the issue of people with disabilities to the policy level. It was about alerting the policymakers that it is time for inclusiveness and equality. These were the messages that the event culminated with.³⁶

Wheelchair Dance Show and Wheelchair Miss Pageant followed the first-ever Fashion Show in the following years.

President of the National Association of Blind Citizens (NABC), Gerel Dondov, spoke about the annual Solar Cup ceremony that the NABC awards to individuals and organisations who significantly contributed to advancing the lives and rights of people with disabilities. ‘The aim of the Solar Cup is to signal society that people with disabilities do not just receive, but we can give too,’ noted Gerel, ‘the ceremony is transmitted live through a TV channel to reach to a wide audience.’³⁷ Similarly, poetry and singing contests and sport competitions involving people with disabilities have become more frequently organised.

In the last decade, people with disabilities have become more politically active. In the 2012 parliamentary election, five disabled candidates ran, embracing the motto of the International Disability Caucus at the UN Ad Hoc Committee: ‘nothing about us, without us.’ Not only did the number of people with disabilities running in the election increase, but also these candidates claimed political representation on the basis of their disability identity. Badamkhand Dolgorsuren is a journalist who ran in the 2004 and

³⁶ USAID Mongolia, *First ever wheel chair fashion show in Mongolia* (18 June 2013) <<https://www.facebook.com/USAIDMongolia/photos/a.505471516186377.1073741839.117342531665946/505471676186361/>>.

³⁷ Interview with Gerel Dondov, President, National Association of Blind Citizens (Ulaanbaatar, 04 June 2013, updated via Skype on 12 June 2015).

2008 parliamentary elections. Badamkhand said, ‘disabled candidates usually avoided identifying their disability.’³⁸ Although none of the five candidates were elected, they consider that the election campaigns were important advocacy tools for people with disabilities. ‘Our campaigns signalled that people with disabilities do not want to strive in the shadow of the society, but we want to thrive in front of it,’ said athlete Baatarjav, who was one of the five candidates. He added ‘the *Convention* gave me confidence to run in the election.’³⁹ Baatarjav also claimed that their campaigns made politicians aware of the political non-representation of people with disabilities and that awareness led to the creation of the Disabilities Division.

Several disability activists thought that, in recent years, their personal lives were changed in ways that they would not have been otherwise. During a training program in August 2006, I met with a timid, young woman of my age, Chuluundolgor Bat. At that time, Chuluundolgor was a new member of the Association of Wheelchair Users (AWU). After five years, she became an outspoken human rights activist and headed the AWU. ‘Social attitudes are changing,’ started Chuluundolgor when I spoke with her. ‘A few years ago, most people curiously watched me in the streets. Nowadays, such watchful eyes seem to have become rare. But it may be just me seeing this way.’⁴⁰ Chuluundolgor talked about the change in her personal life as:

In the past, we quite often gathered at *Tahilt* sanatorium, the only wheelchair accessible venue outside of Ulaanbaatar. We used to play cards, share our thoughts and feelings, ...had had great time there. At that time, getting to *Tahilt* was the biggest problem. If Tumuruu was going to *Tahilt*, everyone would want to fit into his car, because he was the only person who has a car. We do not have a transportation problem today. But a person who can spare time going to *Tahilt* is rare. We are all busy now.⁴¹

Although it was seemingly safe to conclude that these changes occurred because the *Disabilities Convention* galvanised local actors, weighing the exact contribution of the *Convention* is difficult. The interviews indicate that the *Convention* galvanised local

³⁸ Interview with Badamkhand Dolgorsuren, Director, *Salkhich Shuvuu* NGO (Ulaanbaatar, 30 May 2013).

³⁹ Interview with Baatarjav Dambadondog, President, United Association of Organisations of People with Disabilities (Ulaanbaatar, 17 June 2013).

⁴⁰ Interview with Chuluundolgor Bat, Head, National Association of Wheelchair Users (Ulaanbaatar, 7 June 2013).

⁴¹ Ibid.

actors in two main ways: by creating hope and also by ushering a new, empowering way to reframe their understanding of disability. I will now turn to each of these points.

1 *Hope*

The recent developments in the disability area — such as the adoption and ratification of the *Disabilities Convention*, changes to domestic laws and policies, and related events — incited hope for Mongolian activists. Most activists expected that, following the *Convention*'s ratification, the lives of people with disabilities would improve.⁴² Some others expected that the *Convention* would enable them to bring their concerns to the international level. Yet, as Sally Merry too observed, it seemed that whether such hope can endure depended on the government response to the disability activists.⁴³

As described above, disability activists and DPOs got more active in the course of the events and reforms undertaken in 2006-8. Despite the fact that the *Convention* was ratified under the Bayar government, both the Bayar and Batbold governments were inactive on disability issues, causing despair and disappointment among disability activists. For example, Gunjilmaa Batsuuri, director of the Business Incubator Centre (BIC) and former literary teacher, stated that 'after the ratification, the excitement about the *Convention* faded away and we realised that how far was the international level from us.'⁴⁴ Yet again, the establishment of the Disabilities Division seemed to have revived the hope that the *Disabilities Convention* can help to change the lives of people with disabilities.⁴⁵ Gerel, a President of the NABC, nicely described the dynamics of such hope as:

We expected that our lives would be transformed once the *Convention* is ratified. Sadly, nothing has changed after the ratification. It was a big disappointment. We then realised that it was us who should bring changes in our lives, not the government. In this endeavour, the *Convention* gives us opportunities. ...To me, the establishment of the Disabilities Division was the most important, tangible achievement the *Convention* so far. I hope that

⁴² Interview with Gerel Dondov, President, National Association of Blind Citizens (Ulaanbaatar, 4 June 2013, updated via Skype on 12 June 2015).

⁴³ See Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2005) 215-16.

⁴⁴ Interview with Gunjilmaa Batsuuri, Director, Business Incubator Centre (Ulaanbaatar, 17 June 2013).

⁴⁵ Interview with Avirmed Yamkhin, Head, Aivuun NGO (Ulaanbaatar, 11 June 2013).

the Division will bring substantive changes for people with disabilities as it builds expertise and capacity, and engages with sector constituencies.⁴⁶

2 *Idea*

Many disability activists identified that the most important impact of the *Convention* in Mongolia was ‘in minds of people.’⁴⁷ They considered that most people with disabilities were ‘inactive’,⁴⁸ ‘pessimistic about their future’⁴⁹ and ‘much accustomed to and dependent on social care and assistances’,⁵⁰ but the situation was changing. Most research participants identified that the idea that society disables impaired people was increasingly discussed in relation to the *Convention* was revolutionary for them. ‘Thinking back again, it was so true that the inaccessible society disables us, not impairment,’ said Chuluundolgor; ‘the *Convention* made me realise it.’⁵¹ She continued:

To me, the most important outcome of the *Convention* was changes to attitudes. Social attitudes to people with disabilities are changing. People are getting used to seeing people with disabilities in the streets. Importantly, the attitudes of people with disabilities are changing. In the past, people with disabilities pitied themselves and used to ask for benevolence from the state. Now, we, at least those who are socially active and participate in DPOs, see that people with disabilities are equal members of the society — we must participate in decision-making, otherwise, the society would not serve to our needs and interests.⁵²

While briefing various audiences such as disability activists, medical professionals, the *Tegsh Duuren* program team, teachers and students of special schools in Ulaanbaatar and ordinary people about the *Disabilities Convention*, during the course of the ratification campaign in 2007-8, I saw that this was true for many other people. Unlike Australia, where the social approach to disability was recognised and institutionalised in the early 1990s, for many Mongolians, it was an inspiring new idea that reframed their understanding of disability.

⁴⁶ Interview with Gerel Dondov, President, National Association of Blind Citizens (Ulaanbaatar, 4 June 2013).

⁴⁷ Interview with Tsedelbal Togoogurjav, President, National Association of Organisations of People with Hearing Impairments (Ulaanbaatar, 31 May 2013).

⁴⁸ Interview with Undrakhbayar Chuluundavaa, Director, Universal Progress Centre NGO (Ulaanbaatar, 11 June 2013, updated via Skype on 16 May 2015).

⁴⁹ Interview with Avirmed Yamkhin, Head, Aivuun NGO (Ulaanbaatar, 11 June 2013).

⁵⁰ Interview with Gunjilmaa Batsuuri, Director, Business Incubator Centre (Ulaanbaatar, 17 June 2013.)

⁵¹ Interview with Chuluundolgor Bat, Head, National Association of Wheelchair Users (Ulaanbaatar, 7 June 2013).

⁵² Ibid.

Nevertheless, not all ideas encompassed in the *Convention* were as inspirational as the social approach to disability. It seemed that the ideas resonating with the experiences of local actors were more valued and embraced. A question was raised whether some ideas of the *Convention* would sit with the cultural values of Mongolia. For example, Gunjilmaa said:

I think the *Disabilities Convention* can be fully implemented in Mongolia. However, there seems to be an issue to consider. We are family-oriented people. After I got disabled, I understood how integral family was to my life. My family gave me strength to get up again. Focusing on individuals, the *Convention* seems to alienate family members from people with disabilities [showed a timid look]. People with disabilities need to live with their families. Especially, since a government cannot solve all problems for us, disability policy should support the families with a disabled member as a whole — not just an individual person with disability.⁵³

Moreover, Mongolian actors, including both public officials and disability rights activists, commonly acknowledged that they hardly understand the *Convention* ‘properly’.⁵⁴ Understanding the philosophy (or the ideas) and the legal norms of a human rights treaty may mean quite different issues. Although research participants did not distinguish these meanings, they seemed to have referred to both ways of understanding and knowing the *Convention*. President of the DPO Federation, Oyunbaatar Tsedev, said that:

The *Convention* is a great text and everyone likes talking about it. Yet, no one really understands it. With the *Convention*, we can bring our concerns to the UN Committee — to the international community. But, we do not know how to use the *Convention* as international law.⁵⁵

Chair of the Disabilities Division, Batdulam, also spoke of this:

The *Convention* is a useful document with inspiring ideas. We can select the issues to work with from *Convention* norms. But it is imprecise. Some expressions in the *Convention* such ‘reasonable’ or ‘as much as possible’ are obscure, causing difficulties for implementation. It is probably because the *Convention* is an international law and so, it must be generally termed in order to be applicable to various contexts. ...We do not quite know how to implement the *Convention* norms. I hope that the upcoming CRPD

⁵³ Interview with Gunjilmaa Batsuuri, Director, Business Incubator Centre (Ulaanbaatar, 17 June 2013.)

⁵⁴ Confidential Interview No 1 (Ulaanbaatar, 30 May 2013).

⁵⁵ Interview with Oyunbaatar Tsedev, President, DPO Federation (Ulaanbaatar, 27 May 2013).

Committee review of Mongolia's initial report and its recommendations will give us a detailed direction of implementing the *Convention*.⁵⁶

Moreover, Undrakhbayar, head of the Universal Progress Centre NGO, described the lack of understanding of the *Disabilities Convention* as:

The real challenge for implementing the *Disabilities Convention* in Mongolia not commitment, but it is comprehension. ...Public officials, who draft laws or who implement laws, do not understand the underlying values of the *Convention*. In recent years, social assistances provided to people with disabilities has improved. However, in assisting and providing services to people with disabilities, social workers tend to keep us at home, rather than encouraging us to participate in the society.⁵⁷

Even though most Mongolian actors found the *Convention* a difficult instrument, they embrace it and refer to it in official dialogues. For example, Gerel said:

It was hard to comprehend the *Convention* initially. But, by practising, I learnt to use it. I often mention about the *Convention* and identify a relevant provision, when talking to government officials. Reminding about international obligations that Mongolia voluntarily accepted makes a huge difference to public officials.⁵⁸

However, not all Mongolian DPOs embrace the *Disabilities Convention*. Tsedenbal Togoogurjav, President of the National Association of the Organisations of the Deaf, asserted that:

The *Disabilities Convention* is not our treaty, but is a treaty for people with disabilities. We, deaf people, are not disabled. But rather, we form a unique group with own cultural and linguistic identity. That is why the deaf do not compete in the Paralympics and hold the Deaflympics.⁵⁹

No doubt, these research participants form a small, active segment of Mongolian people with disabilities. It is quite possible that ordinary people with disabilities do not feel the social and political changes described in this section. In fact, some disability activists, who described these social and political changes, noted that 'nothing has changed for ordinary people with disabilities, especially for those who have severe disabilities and

⁵⁶ Interview with Batdulam Tumenbayar, Head, Division for Development of People with Disabilities, Ministry of Population Development and Social Protection (Ulaanbaatar, 3 June 2013).

⁵⁷ Interview with Undrakhbayar Chuluundavaa, Director, Universal Progress Centre NGO (Ulaanbaatar, 11 June 2013, updated via Skype on 16 May 2015).

⁵⁸ Interview with Gerel Dondov, President, National Association of Blind Citizens (Ulaanbaatar, 4 June 2013, updated via Skype on 12 June 2015).

⁵⁹ Interview with Tsedenbal Togoogurjav, President, National Association of Organisations of People with Hearing Impairments (Ulaanbaatar, 31 May 2013).

cannot get out of home.’⁶⁰ However, the research participants are nevertheless members of their community and the agents of change, who inspire and motivate their peers.

The galvanising effects of the *Disabilities Convention* were most visible among the front-line disability activists. Yet, ordinary people with disabilities most often ‘got inspired and became socially active through their friends, peers or local disability activists.’⁶¹ It was interesting for me to see that newer disability activists as well as people who were taking part in public events were not aware of the *Disabilities Convention* and its influences upon the activation of the disability sector. At the 2013 ‘*Deeltei Mongol*’ (‘Mongols in National Costumes’) festival, an annual celebration that is organised on the day after the *Naadam* holiday,⁶² I had a quick conversation with a young man with a wheelchair. ‘It is nice joining the crowd. I came here as two of my friends were going,’ said the young man and arranged his skilfully-made, turquoise hat that nicely matched with his *deel*.⁶³ ‘A few years ago, I would not be thinking of going out in the street, unless that was absolutely necessary, such as seeing a doctor.’ The galvanising effect of the *Convention* may thus be subtle and diffused for most people with disabilities.

IV THE *DISABILITIES CONVENTION* AND MONGOLIAN DPOs

Compared to the years that I closely engaged with them, Mongolian DPOs have changed significantly. First of all, due to increased funding in the area, DPOs grew in number.

In relation to the Convention, many more DPOs were established in the last few years. Many among those NGOs established as in the gain of individuals, for example, with a sight on benefiting from the increased funding to DPOs. However, as long as those DPOs are doing something for people with disabilities, they are still contributing to social change.⁶⁴

⁶⁰ Interview with Undrakhbayar Chuluundavaa, Director, Universal Progress Centre NGO (Ulaanbaatar, 11 June 2013, updated via Skype on 16 May 2015), Uyanga Enkhbold, Officer, Embassy of the United States of America in Mongolia (Ulaanbaatar, 18 June 2013).

⁶¹ Interview with Undrakhbayar Chuluundavaa, Director, Universal Progress Centre NGO (Ulaanbaatar, 11 June 2013, updated via Skype on 16 May 2015).

⁶² The annual *Deeltei Mongol* festival that is celebrated to embrace Mongolian traditional costumes is organised on 13 July.

⁶³ A *deel* is a gown-like Mongolian national costume worn by both men and women.

⁶⁴ Interview with Chuluundolgor Bat, Head, National Association of Wheelchair Users (Ulaanbaatar, 7 June 2013).

Most importantly, I found that the agenda, strategies, capacity and expertise, and networks of Mongolian DPOs were different from the past. Although all of these changes were not directly attributed to the *Disabilities Convention*, it mobilised disability activists and pushed them for action. Through acting, DPOs themselves were changing. In this development process, the *Convention* was useful in a variety of ways.

A *Agenda and strategies*

The agendas of DPOs, who traditionally mobilised around social welfare and employment issues, have expanded. New areas of concern include social accessibility, political participation, independent living, reproductive rights, access to justice and statistics of people with disabilities. In the past, Mongolian DPOs pursued their goals largely through lobbying politicians for legal changes. By the time of my fieldwork however many DPOs were promoting positive social attitudes towards people with disabilities and providing peer support. Many activists attributed the diversified agenda and strategy of DPOs to the *Disabilities Convention*. Gerelmaa Amgaabazar, a program manager of the Open Society Forum, a local think-tank NGO founded on the basis of the disbanded Mongolian branch of the Soros Foundation, explained that:

The *Disabilities Convention* interpreted human rights norms in the context of disability and clarified the areas of concern in order for improving lives of people with disabilities. It would not be wrong to say that, before the *Convention*, what DPOs demanded from government was basically funding. By operationalising human rights norms in the context of disability, the *Convention* enabled people with disabilities to understand their problems systematically.⁶⁵

Not only disability activists, but also human rights and women's rights activists that I interviewed, identified human rights treaties as helpful guidelines in their works. Urantsooj Gombosuren, a head of the Human Rights and Development Centre — a well-recognised Mongolian NGO — described their use of an international human rights instrument as:

We refer to international instruments in interpreting human rights norms of the *Constitution* and Mongolian laws. Our programs are basically designed around treaty norms. For example, in order to develop the 'Right to Food' program, we identify the elements of the right to food using the *ICESCR* and

⁶⁵ Interview with Gerelmaa Amgaabazar, Program Manager, Open Society Forum (Ulaanbaatar, 20 June 2013).

relevant general comments. Then, we see if we can tailor the content of the right into our context. This is how we develop our program.⁶⁶

Moreover, some disability activists questioned the implications of social policies in terms of the *Disabilities Convention*. For example, Gunjilmaa, said that:

I support the recent increase of social assistances and services directed to people with disabilities. However, too much expansion may strengthen the negative social attitude of people with disabilities as needy and burdensome. The welfare-dependency may also make people with disabilities inactive and lazy. Eventually, it could lead to the conditions that are opposite to the *Convention*'s intention.⁶⁷

While I was able to find evidence that the *Disabilities Convention* contributed to the expansion of the agenda and strategies of Mongolian DPOs, some of these changes were not necessarily related to the *Convention*. Mongolian DPOs were expanding with a young generation of activists, who lived and were educated in developed countries, and enriched disability activism with new ideas. Undrakhbayar Chuluundavaa is one such activist, who was educated in Japan and founded the Universal Progress Centre, which advocates for establishing independent living centres in Mongolia. Other young people, although they do not actively participate in activities of DPOs, were challenging the negative social attitude of disability and inspiring others.⁶⁸

It should also be noted that, along with newer strategies, the lobbying of politicians — the traditional strategy of Mongolian DPOs — was still prominent. Disability activists see an election as a pivotal opportunity to advance their mission. DPOs attempt to influence the election platforms of major political parties and to enrol an influential politician to their mission by supporting them during the election campaigns. During the 2012 parliamentary election campaign, DPOs lobbied the political parties to reflect certain disability issues in their platforms. Before the 2013 presidential election, DPOs concluded a memorandum of understanding with a Democratic Party candidate, Tsahia Elbegdorj, who ran for office for his second term. President Elbegdorj was re-elected

⁶⁶ Interview with Urantsooj Gombosuren, Head, Human Rights and Development Centre (Ulaanbaatar, 12 June 2013).

⁶⁷ Interview with Gunjilmaa Batsuuri, Director, Business Incubator Centre (Ulaanbaatar, 17 June 2013.)

⁶⁸ See, eg, Dari, Nomin 'Disability awareness activist Uyanga Erdenebold, Ulaanbaatar, Mongolia', *The Huffington Post* (online) 17 March 2014 <http://www.huffingtonpost.com/nomindari-goulden/disability-awareness-blindness_b_4979959.html>.

and, at his inauguration, the President pledged his full support to people with disabilities.

B *Capacity and expertise*

The research participants commonly indicated that the capacity and expertise of DPOs had improved significantly in recent years. ‘In some areas, DPOs accumulated more expertise than government officials and the *Disabilities Convention* contributed to such change,’ said Nasandelger Zandankhuu, a program manager for Merci Corps Mongolia.⁶⁹ In 2008-12, Nasandelger managed Merci Corps’s ‘Fostering Inclusive Development for Local Disabled’ (FIELD) program, which promoted the accessibility of social environment and the social participation of people with disabilities. Nasandelger pointed to two small projects supported by her program that helped to build DPO capacity.

The first project was aimed at monitoring the accessibility of public roads and was implemented by the AWU. In the course of the project, the FIELD project trained the AWU team on the methodologies to conduct the monitoring, provided the necessary equipment and funded the initial rounds of assessment undertaken in 2010-11. The monitoring report and recommendations were submitted to the Ministry of Roads, Transportation, Construction and Town Planning. Recognising the importance of the monitoring, in 2012 the Ministry funded the AWU in undertaking a complete assessment of the remaining public roads of the capital city. While achieving its intended aim, the project also helped to build a sustainable partnership between the Ministry and the AWU. In 2013, Chuluundolgor, a head of the AWU, was appointed to the Construction Supervisory Committee affiliated to the Ministry, which monitors the standard-compliance of new constructions and approves their utility. According to Chuluundolgor, 78.3 per cent of about 800 public construction projects that have been built in Ulaanbaatar in 2012-13 complied with the disability accessibility standards.⁷⁰

⁶⁹ Merci Corps Mongolia works for rural economic growth, developing rural businesses, building civil society, promoting good governance practices, and creating an open and transparent society. See Merci Corps, *About Merci Corps Mongolia* (2017) <<http://mercy Corps.org.mn/beta/index.php/en/about-mcm/our-mission>>.

⁷⁰ Interview with Chuluundolgor Bat, Head, National Association of Wheelchair Users (Ulaanbaatar, 7 June 2013).

Nasandelger acknowledged that the *Disabilities Convention* contributed to the success of the project and said that:

In relation to the *Disabilities Convention*, two standards on construction and road accessibility were adopted. The standards made a huge difference. In the first phase of the FIELD project implemented in 2008-10, we, regardless of its angle and material used, counted any slope passage as a ramp. But now, DPOs can demand the standard-compliant ramps.⁷¹

The BIC implemented the second project, which aimed at promoting electoral accessibility, funded by Merci Corps. For the first time in Mongolia, electronic polling machines were used in the 2012 parliamentary election. While promoting the importance of electoral participation among people with disabilities, the BIC tested the fitting of the machines and the rules relevant to people with disabilities. The public demonstration of the machines, involving 384 people with disabilities, indicated that the required full filling of a ballot in front of the names of candidates on a voting sheet, which the polling machines were programmed to count as valid, were not suited for some people with disabilities.

The General Electoral Committee accepted the BIC recommendations and amended the relevant rule of procedure, making a partial filling of a ballot before the name of a chosen candidate to be counted as valid. Moreover, the Committee requested BIC's consultancy in arranging the polling stations to be accessible and suitable for people with disabilities. Consequently, the 2012 parliamentary election saw significantly improved participation of people with disabilities of 74 per cent compared to about 30 per cent in previous elections.⁷² In the 2013 presidential election, the General Electoral Committee hired BIC to get a consultancy in ensuring the accessibility of electoral infrastructure. 2013 presidential election also introduced a Braille voting sheet to Mongolia, marking another milestone in promoting the political rights of people with disabilities. 'With these projects, the BIC not only contributed to ensuring the political participation of people with disabilities and in sustaining democracy, but also, by

⁷¹ Interview with Nasandelger Zandankhuu, Program Manager, Merci Corps Mongolia (Ulaanbaatar, 12 June 2013).

⁷² Interview with Gunjilmaa Batsuuri, Director, Business Incubator Centre (Ulaanbaatar, 17 June 2013).

accumulating the expertise and capacity, the BIC itself became an agent of change,' noted Nasandelger.⁷³

C Policy engagement

Compared to 2008, Mongolian DPOs were increasingly represented in policy advisory boards of the central and local government agencies. All major DPOs were represented in the Disability Policy Council of the Ministry of Social Protection. DPOs were also represented on advisory boards of the Ministry of Construction and Roads, the Ministry of Labour, the NHRCM, the Mongolian National Broadcasting Corporation and the Central Commission of Employability Assessment. DPOs realised the importance of such policy engagement and sought to be represented in similar bodies of relevant government agencies. President of the NABC, Gerel, who then was appointed to the position of disability rights advisor to the President Elbegdorj, said:

We understood that laws and policies would not reflect our circumstances and needs unless we participate. Therefore, we now press the government agencies hard to get represented in their advisory bodies. Some agencies were reluctant and some were supportive. The Ministry of Labour agreed to establish a disability advisory council. Yet, the Ministry of Health prefers an ad hoc engagement with DPOs. We also seek to be represented in local governments. I think that the current government is committed for making changes in disability area. But the commitment alone is not enough, if the government does not ask people with disabilities what they want.⁷⁴

Several disability activists indicated that the government had become more attentive to DPOs, influenced by the *Disabilities Convention*.⁷⁵ 'The government is alert to disability issues these days,' said Gerel, 'the *Convention* helped to broaden our access to policy-making.'⁷⁶ Similarly, Baatarjav said that:

Before the *Convention* was adopted, attracting the attention of government on disability issues was difficult. At some occasions, we had to make harsh

⁷³ Interview with Nasandelger Zandankhuu, Program Manager, Merci Corps Mongolia (Ulaanbaatar, 12 June 2013).

⁷⁴ Interview with Undrakhbayar Chuluundavaa, Director, Universal Progress Centre NGO (Ulaanbaatar, 11 June 2013, updated via Skype on 16 May 2015).

⁷⁵ Interview with Gerel Dondov, President, National Association of Blind Citizens (Ulaanbaatar, 4 June 2013, updated via Skype on 12 June 2015), Chuluundolgor Bat, Head, National Association of Wheelchair Users (Ulaanbaatar, 7 June 2013), Interview with Avirmed Yamkhin, Head, Aivuun NGO (Ulaanbaatar, 11 June 2013), Interview with Undrakhbayar Chuluundavaa, Director, Universal Progress Centre NGO (Ulaanbaatar, 11 June 2013, updated via Skype on 16 May 2015).

⁷⁶ Interview with Gerel Dondov, President, National Association of Blind Citizens (Ulaanbaatar, 4 June 2013, updated via Skype on 12 June 2015).

moves like threatening politicians by demonstration or throwing stones to the State Palace. As the government has international obligations under the *Convention* now, it became more attentive towards us.⁷⁷

D *Networking*

It was evident that Mongolian DPOs became more connected with international and domestic actors on human rights and social justice. International events such as training programs, conferences, roundtables, exchanges, and monitoring fora of the international human rights regime provide opportunities for Mongolian DPOs to get networked globally. Many Mongolian DPOs became official members of international NGOs. International networks enable DPOs to get assistance such as information and skill exchange, expertise and capacity development and funding.⁷⁸ Not only disability activists, but also government officials highlighted the importance of these international events, where they get inspired, acquire knowledge and expand connections.⁷⁹

Engagement with the international human rights regime, such as the UPR or the CRPD Committee review was identified as amongst the most important events. While becoming important capacity-building exercises in themselves, these UN-based events particularly inspired disability actors. ‘During two days at the CRPD Committee, I felt strongly the need to develop myself and to learn to use the *Convention* as international law,’ said Undrakhbayar.⁸⁰ A local human rights expert who coordinated the Mongolian civil society report to the UPR, observed that, notwithstanding the other important impacts of the UPR, the process itself was very important as it helped to create and sustain a network and dialogue among local NGOs working in various areas of human rights. ‘In order to write the civil society report to the UPR, NGOs, who otherwise work in silos, were required to sit together and identify the most pressing human rights

⁷⁷ Interview with Baatarjav Dambadondog, President, United Association of Organisations of People with Disabilities (Ulaanbaatar, 17 June 2013).

⁷⁸ Interview with Gerel Dondov, President, National Association of Blind Citizens (Ulaanbaatar, 4 June 2013, updated via Skype on 12 June 2015).

⁷⁹ Interview with Batdulam Tumenbayar, Head, Division for Development of People with Disabilities, Ministry of Population Development and Social Protection (Ulaanbaatar, 3 June 2013).

⁸⁰ Interview with Undrakhbayar Chuluundavaa, Director, Universal Progress Centre NGO (Ulaanbaatar, 11 June 2013, updated via Skype on 16 May 2015).

concerns. It allowed NGOs to see the human rights situations of the country holistically,’ said Batchuluun Khishigsaikhan.⁸¹

The partnerships among DPOs and other local NGOs were also strengthened. DPOs, which did not have sustained and close engagement with other NGOs, became a member of various NGO networks such as the Education Alliance, the Environmental NGOs’ Network and the MONFEMNET, a network of women’s NGOs. Disability activists indicated that such partnerships helped them in building their capacity and mobilising through a broader civil society network. For example, Undrakhbayar mentioned that:

Having been involved in their activities and becoming a member of NGO networks, we realised that we can learn much from more experienced NGOs, those working in the area of human rights, women’s rights and environmental protection. I thought that those NGOs would not be interested in disability issues. But, through our involvement, they became more aware of disability issues and recognised the urgency of supporting the rights of people with disabilities.⁸²

Furthermore, Mongolian DPOs were working out ways to cooperate with each other efficiently. The DPO Federation, once a successful alliance, was de facto dissolved in 2008, largely because of misunderstanding of its status among its members. In the same year, several DPOs formed the United Association as a new peak body. However, the United Association too was becoming unstable by June 2013. There was a need for Mongolian DPOs to have a collective voice on issues of common interest. Also, government agencies preferred to work with few representatives, rather than a broad sway of DPOs. ‘By failing and succeeding, we are figuring out a way to work together for issues of common interest,’ said Chuluundolgor, ‘a potential way of cooperation could be that, instead of establishing a permanent peak organisation as we did several times before, we could form issue networks at times.’⁸³ In these ways, Mongolian DPOs have changed significantly in the last decade.

⁸¹ Interview with Khishigsaikhan Batchuluun, Program Manager, Open Society Forum (Ulaanbaatar, 5 June 2013).

⁸² Interview with Undrakhbayar Chuluundavaa, Director, Universal Progress Centre NGO (Ulaanbaatar, 11 June 2013, updated via Skype on 16 May 2015).

⁸³ Interview with Chuluundolgor Bat, Head, National Association of Wheelchair Users (Ulaanbaatar, 7 June 2013).

V CONCLUSION

Compared to the instrumentalist story presented in Chapter Eight, the contextual story reveals a range of effects that the *Disabilities Convention* produced in Mongolia. Comparing to Australia, Mongolia had a minimal engagement in the *Convention's* drafting. However, the *Disabilities Convention* has influenced Mongolia before it was adopted by the UN. The developments around the *Convention* alerted particular authorities of Mongolia about a forgotten group in the society. Local events and initiatives supplemented the global development, fostering collaboration among local actors. As a result, Mongolian disability laws have been intensely amended in 2006-08. This exemplifies the potential of the international human rights regime to influence domestic spheres even in the absence of the binding nature of international treaties.

The developments of disability laws and policies after the *Convention's* ratification demonstrate ad hoc relevance of an international law in Mongolian policy-making. Despite some new laws, there is no functional system to ensure the compliance between international and domestic laws and therefore the efficacy of international law in policy-making depends on individuals who draft laws and policies. The *Convention* ratification in 2009 did not trigger a policy change immediately. However, important developments have taken place after the Altankhuyag government came into power. A new disability division that was in fact randomly established has played an important role. Particular individuals, who had worked closely with DPOs and are familiar with the *Disabilities Convention*, were employed for the division and, in collaboration with their DPO colleagues, made the discussed policy developments. However, those key actors lack of expertise to comprehend the *Convention's* philosophy and translate some complex concepts. As a result, the *Law on the Rights of Persons with Disabilities 2016*, although it was adopted as a tool to implement the *Convention* in Mongolia, became an ill-translation of the *Convention*.

The ad hoc relevance of an international law in Mongolian policy-making can also be seen from an uneven application of the *Disabilities Convention* in the recent policy reforms. While the laws and policies drafted under the Disabilities Division tend to reflect the *Convention*, it almost has no role for other reforms such as the early intervention reform.

Beyond legal and policy developments, the contextual story of Mongolia demonstrates that the *Disabilities Convention* has powerfully galvanised local actors. I have seen that people with disabilities have become more socially and politically active in the last decade, even though such tendency was not widespread. By galvanising local actors, the *Disabilities Convention* has been influencing to Mongolia's social context significantly. The conventional call for a sympathy as an advocacy strategy of Mongolian DPOs has changed with more empowering messages. Social events, highlighting the capabilities and social contributions of people with disabilities, have become more common. Political participation of people with disabilities has also been invigorated. In the last decade, Mongolian DPOs had grown in number, and their expertise and capacity have significantly been developed. Disability activists have become more connected with their international peers as their participation to international events became more frequent. Local networks among DPOs and other human rights NGOs have also been strengthened. Networking allowed DPOs to be more capable and influential. Through these and other non-legal ways, the *Disabilities Convention* was affecting Mongolia's social and political contexts.

CHAPTER TEN

LOOKING CLOSELY, LOOKING BROADLY

I INTRODUCTION

Human rights is a field that is monopolised by law. Legal texts are the backbone of the regime, and lawyers are technical experts who dominate the academy and practice of human rights.¹ It is not surprising then that scholars mostly approach human rights treaties from narrow, instrumentalist perspectives. The value of human rights treaties is often judged on the basis of the presumed direct effects of their norms, although establishing a direct causation between the cause and effects is problematic. Studies tend to suggest that poor treaty implementation and thus most scholars advocate for more coercive means of norm enforcement for better treaty regime. Relatedly, the literature focusing on the mechanisms of a human rights change envisions a relatively straightforward process of treaty implementation—starting from ratification to norm incorporation, then progression to the implementation stage and, finally, achievement of a human rights change. For this type of literature, government responses to a human rights treaty, especially the act of ratification and the extent which treaty norms are incorporated into domestic legal orders, are of primary importance. In contrast to these instrumentalist assumptions, the present thesis provides more complex pictures in two implementation case studies of the *Disabilities Convention*.

The present Chapter revisits the key findings of the research and places them in the context of human rights scholarship. I examined two very different countries, but what I have found in these countries has been surprisingly similar at one level. This concluding Chapter is divided into four main parts. Part I compares the views of treaty implementation that are seen through instrumentalist and contextual lenses. It shows the limitations of the instrumentalist approach and warns that, without understanding the context, the assessments of treaty implementation that are based on domestic legal and policy changes can be misleading. This part also highlights a central finding of this research: the *Disabilities Convention* galvanised local actors in the two countries studied. Drawing on their galvanising effect, I argue that human rights treaties can

¹ Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Polity Press, 2nd ed, 2011) 8.

deeply engage domestic contexts regardless of government actions and formal domestic legal incorporation.

Part II focuses on the politics of human rights. In the absence of strong international enforcement mechanisms, international and domestic political actors are too often seen as the vanguard of treaty implementation. Chapter Two discussed how leading theories in the scholarship predict the conditions of success and failure of human rights politics. In doing so, partly because of their instrumentalist foci, these theories communicate rather fixed images of domestic politics. This research examining the politics of human rights in two domestic contexts offers evidence to challenge some dichotomies of these theories. In this part, I question the scholarly ambition to theorise human rights change as an inevitable process.

Part III engages with the widely debated question in the scholarship: '*does a human rights treaty makes a difference on the ground?*' The conventional wisdom of human rights change suggests that ratified treaty norms will be reflected in domestic laws and, over time, those domesticated norms create human rights change. In contrast, this research finds minimal differences created by the legal obligations in the *Convention*, but significant change created by its potential to galvanise local actors.

Part IV discusses what this research offers to better 'implementation' of human rights treaties. Due to the dominance of the instrumentalist approach, the practice of treaty implementation is overly focused on incorporation and implementation of treaty norms. Quite often, the practice neglects the values underlying the treaty norms. Human rights treaties not only guide the conduct of states parties, but they also declare, validate and communicate certain values. These values, which are woven through the experiences of injustice and disadvantage of certain groups of people and their hope for better futures, are sources of the political power of human rights treaties.

II THE IMPACT OF THE DISABILITIES CONVENTION ON AUSTRALIA AND MONGOLIA

A *The instrumentalist story*

Through an instrumentalist lens, there are many reasons to celebrate the *Disabilities Convention*. In both countries, legal and policy developments in the area of disability

have intensified in the years following the ratification of the *Convention*. In 2010, Australia adopted its first national policy concerning people with disabilities — the *NDS*. The *NDS* led to the *NDIS*, a major reform that transformed the concept and funding of Australian disability services. As discussed in Chapter Four, the texts of the *NDS* and the *NDIS Act* demonstrate their close ties with the *Disabilities Convention*. Both instruments explicitly state that their purposes are to implement Australia's international obligations under the *Convention*.² The *Disabilities Convention* resulted in legal changes not only at the federal level, but was also implemented in State and Territory laws and policies. For example, the *Disability Inclusion Act 2014* (NSW) aligns even more closely with the *Convention* than the *NDS* and the *NDIS Act*.

Since 2007, Mongolian laws concerning people with disabilities were regularly amended, improving the types and extent of social welfare assistance for people with disabilities as well as the requirements of social accessibility. In order to implement its obligation under article 33 of the *Disabilities Convention*, the Mongolian government established a specialist disability division in the Ministry of Population Development and Social Protection in 2012. It was the first time a Mongolian government had created a ministerial unit for disability, which previously was amongst several responsibilities of a single officer of the Ministry. In 2013, Mongolia adopted a cross-sectoral, national plan to implement the *Disabilities Convention*.³ In the same year, an early intervention system, which reflected the social dimension of disability in diagnosing the disability of a child, was introduced.⁴ In February 2016, Mongolia adopted a *Law on the Rights of a Person with Disability 2016*,⁵ which closely resembled the *Convention's* content, language and structure. The UN human rights bodies commended these legal and policy developments in the two countries.⁶

At the same time, there are some areas of law where both countries have failed to come to terms with *Convention* norms. Legal inconsistencies are seen more clearly in the case

² *NDS* paras 22, 24; *NDIS Act* s 3(1)(a).

³ Government of Mongolia, *On Approving the Implementation Plan of the [Disabilities] Convention*, Decree No 281 of 2013, 3 August 2013.

⁴ See Section II(B)(2) of Chapter Eight.

⁵ *Law on the Rights of Persons with Disabilities 2016*.

⁶ See *CRPD Committee Concluding Observations on Australia 2013* paras 4, 6; *CRPD Committee Concluding Observations on Mongolia 2015* paras 4(a), 4(b); *UPR Working Group Report on Australia 2016* paras 23, 27, 45, 72, 100, 115, 119; *UPR Working Group Report on Mongolia 2015* paras 50, 74.

of Australia, where social life is heavily regulated and the scrutiny and integrity mechanisms are relatively robust. Australian public institutions such as parliamentary committees, the ALRC and the AHRC have inquired into some contentious areas of law that may be in breach of *Convention* norms. The inquiries have exposed significant incompatibilities between the *Convention* and domestic laws, and recommended that the government rectify the inconsistencies. However, Australian governments have failed to take substantive measures in any of the areas discussed in Chapter Five. In contrast, Mongolian disability laws are still in an early stage of development. Until the adoption of the first disability-specific legislation in 1995, the laws addressed to people with disabilities, which were often very broadly couched, were fragmented in various laws. Thus, the major legal problem for Mongolia is lack of clear procedural regulation and inconsistency between various laws for many human rights covered by the *Convention*.

Through an instrumentalist lens, a mixed picture of treaty implementation emerges. There are significant achievements to celebrate for the two countries. At the same time, there are many areas of domestic laws that do not comply with *Convention* norms.

B *The contextual story*

In contrast to the instrumentalist lens, the contextual lens presents a kaleidoscopic image of treaty implementation with different colours and patterns. As I will explain in more detail in Part III, capturing all such colours and patterns is difficult. However, six noteworthy patterns emerge from the contextual examination.

First, when examining how the various laws and policies implementing the *Disabilities Convention* in the two countries came into existence, the *Convention* appears initially as largely irrelevant to the creation of those laws. In Australia, the Rudd Labor government was predisposed to reform many areas of social justice, including disability services. Drafting the *NDS* was a part of the ALP's 2007 election platform. Also, the Rudd government had a keen interest in restoring Australia's relationship with the UN human rights system, which had been troubled during the Howard government. The *NDIS* happened to be a revival of a forty-year-old idea that originated in the years of the Whitlam government.

Unlike Australia, Mongolia does not have serious partisan politics, where political parties differ clearly in their philosophy. As a unitary state, the central government makes decisions over almost all areas of social life. Since the government is the sole service provider and the DPOs are only emerging, the Mongolian disability sector is not an arena of contested industrial interest. Furthermore, there is a strong sense among Mongolians that caring for vulnerable members of society is an essential attribute of good government. For these reasons, supporting people with disabilities is an issue that does not require a major political consensus in Mongolia. It can be said that, at least since the transition to democracy, Mongolian governments have had identical policies concerning people with disabilities. Therefore, Mongolian government actions in the area of disability may not have needed much prompting, but only reminding. However, as Chapter Seven demonstrated, the prompt has not been the *Convention*, but rather concerned local actors, including politicians, public officials and disability activists. In contrast to the instrumentalist stories, the first picture emerging from a contextual lens is disappointing as the *Convention* has not been a direct cause of the impressive legal and policy developments in the two countries.

Second, this research identifies three conditions that explain the textual connections between the *Convention* and domestic laws. One aspect is relevant only to Australia. In Australia, ratified international treaties allow the Commonwealth Parliament to legislate in areas that would otherwise fall under the jurisdiction of the States and Territories. Commonwealth legislation such as the *NDIS Act* or anti-discrimination laws refer to international human rights treaties subscribed to by Australia; this is because, in adopting those laws, the Commonwealth Parliament exercises its power to legislate for external affairs under the *Australian Constitution*.⁷ Another aspect is that the *Disabilities Convention* is a comprehensive articulation of what human rights might look like in the context of disability, and therefore it is potentially a useful template or model in law and policy-making. In both countries, although a broad spectrum of government officials does not seem to be fully aware of the *Convention*, it is an important resource for those government officials who actually draft laws and policies concerning disability issues.

⁷ *Australian Constitution* s 51(xxix).

An additional factor explaining the textual connection between the *Convention* and domestic laws was the increased involvement of people with disabilities in policy-making in both countries. The Australian culture of holding public inquiries and consultations provides important channels for concerned people to contribute to policy-making. Moreover, in the years following the ratification of the *Convention*, significant institutional changes have taken place in the two countries. New government institutions such as the NDIA of Australia and the Disabilities Division of Mongolia have been established. It has been also common for existing government institutions, where relevant, to give more focus to disability issues and increase the number of employees in charge of disability matters. The *ex-officio* advisory councils and reference groups have been advising disability ministers and other relevant authorities. Most often the people who have lived experiences of disability have filled up these newly created jobs and advisory roles and many of them attach great importance to the *Disabilities Convention*. Once a political decision is made with respect to a certain issue, the *Convention* has proven to be a useful model in policy-making.

The third, probably the most important, pattern emerging from a contextual lens is the *Convention's* impact in galvanising local actors. As a research participant from Australia described it, the *Convention* has created 'a wave of energy among people.'⁸ While working closely with Mongolian DPOs and talking about the *Disabilities Convention* with various audiences from the disability community, such as students and teachers of special schools in Ulaanbaatar, I witnessed enormous excitement. My impression is that the galvanising effect of the *Disabilities Convention* has been somewhat stronger for Mongolian actors by comparison with Australia. Two conditions may explain this. First, although procedurally and practically porous, international treaties became a part of the Mongolian legal order, once ratified. Most Mongolian disability activists that I interviewed expected that the ratification of the *Convention* would lead to legal reforms, which would transform the lives of people with disabilities. Second, while the social approach to disability has been discussed or, to some extent, institutionalised for at least two decades in Australia, it has been a largely new and empowering idea for most Mongolians. The social approach to disability and the legal

⁸ Interview with Rosemary Kayess, Director of Human Rights and Disability Project, Australian Human Rights Centre at the Faculty of Law, University of New South Wales (Sydney, 26 March 2014).

status of international human rights treaties were the two issues that attracted the most interest and questions from Mongolian actors during training programs and discussions that I engaged in as part of my professional responsibilities at the NHRCM. By galvanising local actors, the *Disabilities Convention* has significantly affected the social fabric of the two countries studied.

A fourth pattern is that, although the fact that Convention galvanised local actors was visible, it is difficult to map fully the further or secondary effects of such galvanisation. But there were some clear examples of changes in the constituencies. In both countries, the number of DPOs has increased in recent years. Especially in Mongolia, the capacity and expertise of DPOs has improved markedly. Policy discussions concerning disability issues have become much more frequent in both countries. The political participation of people with disabilities has improved. In 2010, Kelly Vincent from the Dignity for Disability Party was elected to the South Australian Parliament. And, embracing the motto of the international disability rights movement — ‘nothing about us, without us’ — four disabled candidates ran in the 2012 parliamentary election of Mongolia.

Especially in Ulaanbaatar, people with disabilities have become more visible in public places. Community events involving people with disabilities are frequently organised. The research participants indicated that social attitudes towards people with disabilities were changing. In Australia, this increased recognition involves respect for the personal autonomy of people with disabilities, while in Mongolia, people have become more aware of the capabilities and contributions of people with disabilities as well as the negative consequences of an inaccessible society on disability. The *Convention* affects the personal lives of individuals. People who have engaged in activism around the *Convention* talked about differences that the treaty made in their personal lives. Engaging in disability activism created around the *Convention*, people forge friendships across borders and form families. ‘By becoming a part of a mission that is larger than a life,’ as an Australian disability activist described,⁹ people have added a new, richer dimension to their personal lives. Indeed, I am one of these people, who, in the light of the energy wave of the *Convention*, had an opportunity to learn, befriend and contribute.

⁹ Interview with Frank Hall-Bentick, Board Member, Australian Federation of Disability Organisations (Melbourne, 25 February 2014).

Regarding transformations of NGOs, Gerard Quinn and Theresia Degener write:

People with disabilities themselves are now framing their long-felt sense of grievance and injustice into the language of rights. Isolated injustices need no longer be experienced in isolation. NGOs working with disability issues such as the collaborative project Disability Awareness in Action are beginning to see themselves also as human rights NGOs. They are beginning to collect and process hard information on alleged violations of the human rights of persons with disabilities. While still relatively limited, their human rights capacities are growing. A similar process of self-transformation is under way within traditional human rights NGOs, which are increasingly approaching disability as a mainstream human rights issue. This is important, since these NGOs have highly developed structures, and the development of a healthy synergy between disability NGOs and traditional human rights NGOs is not only long overdue, but inevitable.¹⁰

This research found considerable evidence of the ongoing transformations of individuals — whether ordinary people, civil society actors, government officials or politicians — as well as government and NGOs, even though such transformations seem to occur on a relatively limited scale.

Emphasising this galvanising power, I conclude that the *Disabilities Convention* has triggered legal and policy reforms in the two countries not directly as international law — creating obligations, but by creating political momentum, which made the discussed legal and policy reforms achievable. This is the fifth bold pattern that emerges from the contextual lens. The social and political impacts of the *Convention* have been diffused into the broad social and political processes of the two countries, and therefore, it is hard to identify them. People become activated and inspired through their involvement in local events such as legal and policy reforms or public events like Wheel Chair Dance Show in the case of Mongolia or just as inspired by their peers and friends. But most of them do not know or realise that the *Convention* has triggered increased activism by and about people with disabilities. This explains why Australian disability rights experts felt that the *Convention* has contributed to achieving the NDIS, but at the same time struggle to point to evidence of this. Similarly, no one from Mongolia has been able to point to the exact reason why the Altankhuyag government decided to establish the Disabilities Division, whether the impetus was the Democratic Party's

¹⁰ Gerard Quinn and Theresia Degener, *Human Rights and Disability: The Current Use and Future Potentials of United Nations Human Rights Instruments in the Context of Disability*, UN Doc HR/PUB/02/1 (2002) 2.

'*Mongolians-2020*' policy or, as several research participants identified, the demands of DPOs to create a national implementation mechanism as required by the *Convention*. In any event, in adopting the *Law on the Rights of a Person with Disability 2016*, the committed official from the Disabilities Division played a critical role. A research participant from Australia described his sense of the impact of the *Convention* in these terms:

It would be naïve to believe that these changes are happening because Australia has ratified the *Convention*. It is hard to pull out the string and show that it is what the *Convention* has done. The impact of the *Convention* is more of a snowball type — it gathers force along the way.¹¹

This description captures the nature of the treaty's impact nicely. The *Disabilities Convention* has directly affected society and politics in Australia and Mongolia without being mediated through legal incorporation. These impacts have been subtle as they are diffused into the broader social and political processes of the two countries. The subtlety of the *Convention's* effects is perhaps the most striking finding from a contextual lens.

The sixth pattern emerging from the contextual lens is that legal, political and social impacts of the *Convention* interact with one another in profoundly complex ways. Like the *Convention* itself, domestic legal and institutional developments — the adoption of the *Law on the Rights of a Person with Disability 2016* or the creation of the NDIS and the Disabilities Divisions — have further galvanised disability actors. Through these domestic reforms, the impact of the *Convention* has reverberated in national arenas, but in ways that are more 'vernacularised' into local contexts. A relatively inactive period in the disability area, which followed the *Convention's* ratification, caused despair among Mongolian disability activists. But the creation of the Disabilities Division seemed to have inspired them again. Similarly, an Australian disability activist, and the mother of a disabled child, described the policy developments undertaken by the Hawke government triggered by the IYDP in this way:

At this time, I witnessed a number of politicians take strong principled leadership. I also learnt that anybody can make change and take a leadership role wherever they are. One such government officer made contact with as

¹¹ Interview with Kevin Stone, Executive Officer, The Victorian League for Individuals with a Disability (Melbourne, 26 February 2014).

many people with a disability and their families across Australia as he could find, and forwarded directly to them articles and stories of people with a disability living full and rich lives. This was his cause and he was relentless. In turn, we copied his articles and forwarded them on. We printed them in our newsletters and we stuck them on our fridge doors. ...The new Office of Disability encouraged people with a disability and their families to dream of a better life. Their workshops across Australia, focusing on the Principles and Objectives of the Act, are still remembered as a turning point for many people.¹²

It seems that any formal step for the *Convention*, regardless of its immediate success or failure, reinforces broader social changes effected by the *Convention*. As discussed in Chapter Five, Australian governments failed to implement the recommendations of the inquiries undertaken by its public scrutiny institutions. However, consultations and public hearings organised in the course of those inquiries can create public expectation of change and can also promote public awareness on the issue. In fact, Australian actors were more appreciative of the power of international and domestic human rights laws to change a culture or social values. According to Cheryl Saunders, anti-discrimination legislation contributed to attitudinal change with regard to the diversity of Australian society that caused the removal of discriminatory references concerning Indigenous Australians from the *Constitution* and the abandonment of the White Australia policy.¹³ Similarly, regarding the effects of the two statutory bills of rights in Australia,¹⁴ Andrew Byrnes et al write:

Within a decade since the first of these Acts came into effect, they seem to have a minimal impact on the law of the jurisdictions in which they operate. However, the strength of the Acts seems in their potential to promote the culture of human rights in the government as well as in the broader community.¹⁵

Even in the legal sphere, the failure to implement such recommendations does not always deprive them of impact. A submission by the Australian Federal Court to the Senate Standing Committee on Legal and Constitutional Affairs' inquiry into the ALRC

¹² Margaret Ward, 'The Vision of the Disability Services Act 1986: A Never-ending Struggle' (2006) 31(4) *Journal of Intellectual and Developmental Disability* 253, 253.

¹³ Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis*, Constitutional Systems of the World (Hart Publishing, 2011) 265-67.

¹⁴ *Human Rights Act 2004* (ACT), *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁵ Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 73.

encapsulates why this may be so. The Federal Court noted the benefits of an ALRC report as:

More often than not, an ALRC report contains the best statement or source of the current law on a complex and contentious topic that can remain the case for decades thereafter, whether or not the ALRC's recommendations are subsequently implemented. ...In this way, the ALRC's reports have assisted the Court in the tasks of ascertaining the law, interpreting statute and developing the common law.¹⁶

These accounts of the interactions between domestic legal, political and social impacts of the *Disabilities Convention* are undoubtedly far from complete. But the point here is not to draw a complete picture of how various impacts of the treaty interact with each other. Instead, it is to highlight the complex interactions between different effects of the *Disabilities Convention*.

Evidence from another domestic context supports the argument that I advance in this thesis. David Engel and Frank Munger studied the impacts of the *Americans with Disabilities Act of 1990 (ADA)* through autobiographical narratives of disabled individuals.¹⁷ These scholars found that very few people in the USA asserted their rights through the legal mechanisms made available under the *ADA*; however, many people have found their lives and careers changed by the indirect, symbolic and constitutive effects of rights.¹⁸ 'Rights may enter social settings indirectly, by changing institutional practices,'¹⁹ wrote Engel and Munger, who suggested a close study to illuminate the extraordinary complex relationship between a law and actual life experiences of people.²⁰

Human rights treaties may produce subtle, but profound, domestic effects, which the legalistic vision of the instrumentalist approach cannot capture. In order to understand the complex life of human rights treaties in national arenas, scholarship must to look closely into various domestic contexts and broadly to cover the legal and non-legal impacts of the treaties and their interactions.

¹⁶ Federal Court of Australia, Submission No 22 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Australian Law Reform Commission*, 2 February 2011, 2.

¹⁷ David M. Engel and Frank Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities* (University of Chicago Press, 2003).

¹⁸ Ibid 90-8.

¹⁹ Ibid 11.

²⁰ Ibid 7.

III DYNAMICS OF HUMAN RIGHTS POLITICS

Political mobilisation is a dominant theme in human rights scholarship. Chapter Two discussed the leading theories in this area, namely those of Beth Simmons, Thomas Risse et al, and, in a slightly different way, of Goodman and Jinks, which emphasise transnational and domestic civil society actors in implementing human rights treaties. There is little doubt that transnational and domestic political actors are key drivers of human rights change. However, a contextual examination, which this work offers, suggests that these theories overlook important dynamics of human rights mobilisation.

First, because of its instrumentalist focus, human rights scholarship commonly perceives that political mobilisation will lead to norm implementation. In contrast, my research suggests that human rights treaties can directly affect domestic laws, politics and society without having been mediated through law. By galvanising local actors, the *Disabilities Convention* directly impacted the social and political conditions of the two countries. In most cases, local actors harness such political momentum and aim to achieve what they can in their contexts. In pursuing such ends, they often choose feasible political strategies. This explains why the *Disabilities Convention* did not have much relevance over the subsequent processes related to the legal and policy changes, although it energised the local actors and triggered actions that led to the domestic legal reforms.

The social and political discourses around the NDIS have been mostly about the economic costs and benefits and, to a lesser degree, about the Australian egalitarian sense of ‘fair go.’ The idea of rights has been largely absent in these political and social dialogues: rights-based discourse emerged only briefly in relation to the name change of the NDIS to Disability Care Australia. Mongolian DPOs have become increasingly active in challenging the societal views of disability. However, they too rarely invoked legal rights. Rather, their messages have been mostly about capabilities, the positive contributions of people with disabilities, and barriers caused by inaccessible social environments. In both countries, social and political discourses around disability, and legal and policy changes with regard to disability have often been informed by the ideas that make most sense to the context — not necessarily reflecting a human rights approach to disability.

This research shows that domestic political actors can be extremely selective about the issues to mobilise for. The advocacy of Australian DPOs was critical in changing the Howard government's resistance to the drafting of a disability rights treaty. However, as discussed, the interests of the DPOs in advocating for changes in restrictive immigration health requirements were minimal. Likewise, Mongolian DPOs were relatively vocal on social welfare and employment issues, but they seem to have had not much interest in issues relating to children with disabilities as well as people with mental disabilities. My research demonstrates that civil society mobilisation inspired by a treaty may not always embrace the ideas of rights and may not also advance all human rights. Nevertheless, through acting, DPOs themselves were changing. By becoming agents of change, they have been contributing to social change. In the context of this research, it may be more apt to rename a well-known phrase of Beth Simmons — 'Mobilising for Human Rights' — to 'Mobilising through Human Rights.'²¹

A second challenge to instrumentalist theories posed by this research is that the theories assume that human rights politics begins with treaty ratification. In transnational activist network theory, ratification is the point where a repressive government makes a tactical concession and allows international treaties to penetrate into its domestic sphere.²² Beth Simmons claims that treaty ratification brings civil society actors together and sparks human rights mobilisation.²³ By contrast, this research found that the *Disabilities Convention* created significant changes in the two countries long before ratification or even before adoption by the UN.

Third, the scholarship conveys the common image of human rights politics as a perpetual contestation between a stubborn government and oppressed civil society actors. The cases of Australia and Mongolia show that the government and civil society actors do not always exist in a fixed position — one putting pressure and the other being pressured. Instead, from the two case studies, I found more examples of alliances between the government and civil society. The 'Every Australian counts' campaign, a successful community mobilisation for the NDIS, was necessary for the Gillard

²¹ Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009).

²² Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 28.

²³ Simmons, above n 21, 365.

government to overcome contested domestic politics. Most Australian disability activists I interviewed acknowledged that Parliamentary Secretary Bill Shorten had brought the sector together for the cause. This campaign was organised and supported by politicians.

For issues such as supporting people with disabilities, there is little need for a political fight in Mongolia. There, the challenges are scarce resources and more importantly, expertise. Mongolian governments often work closely with civil society actors, because the latter provide expertise, information and secretarial assistance. From the two countries, I found more examples of constructive engagement and collaboration between public authorities and DPOs than confrontations. Other studies suggest a similar view too. Sally Merry notes that local activists often used pragmatic, dialogic approaches to localise human rights ideas in the five countries in which she studied the impact of global efforts to combat domestic violence.²⁴ David Forsythe also demonstrates that while NGOs can have a direct, positive effect on human rights, often their effect is combined with other factors such as media and government action in a way that the independent causal weight of NGOs is not known.²⁵

A fourth dissonance between my research findings and instrumentalist scholarship is that, although the galvanising effect of the *Disabilities Convention* has been most visible among civil society actors, people often do not belong in rigid compartments such as government officials, civil society actors or academics (experts). In real life, people wear many hats and travel between different roles. A politician or a public official, especially those who have lived experiences of disability either as a parent or a person with disability him/herself, may have also been activated by the energy from the *Convention* and contributed to the changes. In changing the Australian government's position to the drafting of the *Disabilities Convention*, Attorney-General Philip Ruddock, the father to a disabled child, played a critical role. Similarly, a respected Mongolian politician, Sanjaasuren Oyun, the mother of a disabled child, made early intervention reform possible.

²⁴ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2005) 176-77.

²⁵ See David P. Forsythe, *Human rights in International Relations* (Cambridge University Press, 3rd ed, 2012) 254-61.

Ultimately, this research suggests the highly unpredictable nature of domestic human rights changes. By unfolding the dynamics of human rights politics, I question the scholarly ambition of theorising human rights change to be an eternally true, inevitable process. This research found that the most direct effect of the *Disabilities Convention* in Australia and Mongolia was that it mobilised local actors. However, the secondary processes and outcomes were highly contextual, and, at times, coincidental. Most legal and policy changes discussed in the research were achieved under the right conditions, such as a providential combination of people with complementary skills, the unforeseen revival of an idea or the unexpected availability of funding. It is important to restate that legal and institutional developments were only a section of broad political and social changes, which the *Convention* triggered by galvanising people.

Peter Drahos analogises the galvanising effects of human rights treaties with lightning. ‘It is possible to predict that lightning will discharge, but it is impossible to tell the patterns of its flashes,’ said Drahos.²⁶ The connection between a cause and an effect of a social phenomenon is often hard to establish. To borrow an expression from Bottomley and Bronitt, it is one thing to point to a treaty norm, and then point to a practical change such as the adoption of a law that is implementing the norm in domestic legal order, but it is another thing to say that the former caused the latter.²⁷ These scholars write, ‘it is unlikely that any single theory of implementation could account adequately for the variety of groups and interests which can affect the process of implementation in any given stance.’²⁸ John Braithwaite also reminds us to be mindful of ‘theory that is constructed from a set of eternally true propositional building blocks, each supported by a substantial body of empirical evidence,’ because ‘the truth changes over time and truth about humans is changed by the fact of humans discovering it to be true.’²⁹

A theory may provide shorthand to explain complex social phenomena, but it carries the danger of obscuring the dynamics of real life. The main story of the transnational

²⁶ Informal conversation with Peter Drahos, Professor, School of Regulation and Global Governance (RegNet), College of Asia and the Pacific, the Australian National University (Canberra, 7 March 2016).

²⁷ Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012) 334.

²⁸ *Ibid.*

²⁹ John Braithwaite, ‘Beyond Positivism: Learning from Contextual Integrated Strategies’ (1993) 30(4) *Journal of Research in Crime and Delinquency* 383, 385.

activist network theory of Risse et al³⁰ — a state under the control of an oppressive government encountering inevitable human rights change — might seem to capture accurately the situation of post-socialist countries after the 1990s. But, in the case of Mongolia, an attempt to apply the theory gives a shallow story.³¹ Man-ho Heo explored Mongolia's human rights change and explained it through the transnational activist theory.³² Heo's study provides invaluable evidence regarding the causes and effects of the political transformation of Mongolia such as interviews with the key actors. However, it seems that the scholar was overly focused on fitting the reality into the theoretical model. Heo's identification of five phases of the country's transformation appears artificial. For instance, he identifies the entire 70 years of Mongolia's socialism as repressive stage.³³ Heo fails also to take into account important evidence, which seemingly suggests Mongolia's complex internal needs and desires to change the regime.³⁴ Some Mongolian commentators argue that the peaceful democratic revolution was largely Mongolia's protest against the Soviet influence over it.³⁵

³⁰ Risse, Ropp and Sikkink, above n 22, 22-33.

³¹ Man-ho Heo, 'Mongolia's Political Change and Human Rights in Five-Phase Spiral Model: Implications for North Korea' (2014) 29(3) *Pacific Focus* 413.

³² For a detailed account of transnational activist networks theory, see section III(C) of Chapter Two.

³³ Heo, above n 31, 416-22.

³⁴ Ibid 425-26. For example, regarding the causes of Mongolia's democratic transition, Heo writes '[s]uch differences come not only from the impetus of the civil society, but also from the choice of the supreme leader who determined the political context.' On the basis of interviews with the spouse and a close colleague of Batmönkh Jamba, Heo provides interesting accounts about the leader's personal characteristics, which may have enabled a peaceful transformation of the political regime. Furthermore, Heo writes '...Mongolian intellectuals and social networks also played a decisive role in Mongolian democratization. About 60 000 young Mongolians who had studied in Eastern Europe introduced Soviet Russian reforms when they returned.' Despite the interesting nuances that his evidence seemingly suggests, Heo arrives at a rather simplistic conclusion. Heo concludes that:

[W]hen synthesizing the arguments of both sides, it can be concluded that the impetus of the Mongolian democratic revolution came from the civil society; meanwhile, the context of political change was determined by the supreme leader's decision to open the road to democracy. This fact also explains the restoration of a human rights policy by a reactionary regime and the power relations after democratization, as described by the spiral model.

³⁵ See, eg, Tsenddoo Byambajav, 'Нам Үхжээ' [Death of the Party], *Өдрийн сонин* [Daily News], 29 June 2017, available online in Mongolian language: <<http://tsenddoo.niitlech.mn/content/8209.shtml>>. Tsenddoo, a leading Mongolian commentator, writes '...initially, the 1990s's democratic revolution was not about individuals wanting to own their destiny, but about the state endeavouring to be able to mind its own business' <my translation>.

Similarly, Olga Avdeyeva also studied the implementation of the *CEDAW* in 26 post-communist countries plus Kosovo.³⁶ While providing an extensive review of domestic laws and policies implementing *CEDAW* principles in the countries studied, Avdeyeva presents interesting evidence that suggests the complexities of the treaty's impact. For example, Avdeyeva writes:

[P]ost-Communist countries went through a difficult political, economic, and social transition followed by economic crises, which created enormous financial burdens on post-Communist governments and, therefore, precluded the enforcement of these policies. This point is well taken; indeed the data in my analysis demonstrates that poorer states fail to take any action to respond to these policies (Tajikistan, Turkmenistan, Uzbekistan, Georgia, Moldova, Albania, Armenia, and Azerbaijan). At the same time, we see that economically developed countries like Hungary, Slovakia, Latvia, Estonia, and Lithuania did not succeed in enforcing policies on violence against women in a systematic and comprehensive manner. A similar response can be offered in response to arguments about the level of democracy in the countries: the Russian government, which becomes increasingly authoritative, sponsors shelters across the country, whereas the more democratic Latvian, Estonian, and Lithuanian governments do not follow suit. These arguments do not explain why states ratify international laws and why they do not comply with them.³⁷

The reasons for these findings are worth exploring deeply. Avdeyeva may have been too quick to assume what she finds from these countries is the outcomes of acculturation — the theoretical model of Ryan Goodman and Derek Jinks.³⁸

It should however be noted that scholarship is apparently retreating from the approach to theorise human rights change. As discussed in Chapter Two, the original transnational activist network theory was imbued with the ambition to propose a generic theory of human rights change.³⁹ However, in an updated volume, Risse et al recognised that 'a shift towards human rights compliance is a multifactor, interactive process, which may not be captured by a single recipe.'⁴⁰ They write:

[W]e need to state at the outset that it is not clear that a general theory of human rights change is possible, especially as we introduce non-state actors, including corporations, insurgent groups and even individual families into

³⁶ Olga Avdeyeva, 'When Do States Comply with International Treaties? Policies on Violence against Women in Post-Communist Countries' (2007) 51(4) *International Studies Quarterly* 877.

³⁷ Ibid 892-93.

³⁸ Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law?' (2004) 54 *Duke Law Journal* 621; Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford University Press, 2013).

³⁹ See, eg, Risse et al, above n 22, 2.

⁴⁰ Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2013) 276.

the equation.⁴¹ ...This volume does not aspire to write a general theory of human rights change applicable to all actors.⁴²

IV DO HUMAN RIGHTS TREATIES MAKE A DIFFERENCE?

The *Disabilities Convention* has made significant changes to both countries. To a large extent, the engine of these changes has been the power of the *Convention* to galvanise local actors, rather than its norms. Some commentators may claim that this is yet another story of the failure of human rights treaties as the central question concerns legal instruments and legal normativity. Therefore, it is important to respond clearly to the question: ‘*how does the Disabilities Convention as international law make a difference?*’ In this section, I will articulate the symbolic function of human rights treaties and attempt to demonstrate that the galvanising effect of the *Disabilities Convention* is an inextricable quality of its nature as international treaty. Although many scholars recognise the impact of human rights treaties other than their direct implementation, they mostly fail to specify what they mean by such impact and put it aside in an undefined category of ‘indirect’ or ‘broader’ effects.⁴³

John Griffiths provides an illuminating guide to understand the various types of effects of a legal rule.⁴⁴ According to Griffiths, a legal rule is likely to produce four kinds of effects. The first is the direct effect that is a conforming behaviour to what a legal rule prescribes.⁴⁵ Most rules are addressed to two sorts of audiences — a primary audience whose behaviour is prescribed and a secondary audience of legal officials responsible for enforcing the rule; therefore, legal rules usually have primary and secondary direct effects.⁴⁶ The empirical connection between primary and secondary direct effects is obscure.⁴⁷ The second kind of effect is indirect effects, which is the social, economic and other consequences that may indirectly follow from the conforming behaviour. For example, the indirect effect of a traffic rule could be a lower accident rate. According to

⁴¹ Ibid 294.

⁴² Ibid 276.

⁴³ See, eg, Oona A. Hathaway, ‘Do Human Rights Treaties Make a Difference?’ (2002) 111 *Yale Law Journal* 1935, 2020-22.

⁴⁴ John Griffiths, ‘Is Law Important?’ (1979) 54(2) *New York University Law Review* 339.

⁴⁵ Ibid 351.

⁴⁶ Ibid 352.

⁴⁷ Ibid. Griffiths writes that ‘we do not know very much about the question whether and to what extent the public refrains from drunk driving because judges and other officials enforce the rule to that effect, nor on the other hand about the opposite possibility that the likelihood that judges will enforce the rule is affected by the level of primary conforming behaviour.’

Griffiths, indirect effects are usually the implicit references when law is alleged to be important. He writes:

It is not the direct effect of conforming behaviour by people or by judges that the instrumentalist has in mind, but the indirect consequence of allocation of resources or of social and economic development.⁴⁸

A third type of effect, which Griffiths calls independent effects, are particularly important for this thesis. They are the effects of a legal rule, which occur irrespective of any conforming behaviour. 'Law is one way that a society can be, or at least appear to be, of a particular character, and such symbolic activity is important for some people,' writes Griffiths.⁴⁹ A myriad of independent effects could flow from a legal rule. Taking an example of legal reform, Griffiths explains that a legal reform probably has minimal direct and indirect effects, but it helps governments to appear modern and active. It also gives employment and prestige to lawyers, and may comfort the public with the idea that law is rational and up to date.⁵⁰ I will come back to this point below. Finally, as Griffiths conceptualises, a legal rule can have unintended effects. This kind of effect overlaps with those discussed previously, in that all three discussed effects may lie outside what the lawmakers have foreseen and therefore can be unintended effects.⁵¹

In the context of this research, the galvanising impact is certainly an independent effect of the *Disabilities Convention*. Griffiths also points out that independent effects emanate from the symbolic function of a law. Some laws, especially those expressing an identity or a value proposition, have strong symbolic importance.⁵² For example, a constitution symbolises the characteristics of a society and expresses its widely accepted values.⁵³ Likewise, legislation on moral issues, writes Wibren van der Burg, 'tells us something about ourselves, about us as a society and members of that society.'⁵⁴ Given its comprehensive articulation of norms, the *Disabilities Convention* is created with important instrumental purposes. At the same time, as Chapter Four demonstrated, it is

⁴⁸ Ibid 353.

⁴⁹ Ibid 355.

⁵⁰ Ibid.

⁵¹ Ibid 355-56.

⁵² Wibren Van Der Burg, 'The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues' (2001) 20(1) *Law and Philosophy* 31.

⁵³ See Larry R. Baas, 'The Constitution as Symbols: Patterns of Meaning' (1980) 8(2) *American Politics Quarterly* 237; Alvydas Pumputis, 'The Constitution as Symbol and as Instrument' (2004) 50(42) *Jurisprudencija* 66.

⁵⁴ Van Der Burg, above n 52, 36.

also created for symbolic purposes.⁵⁵ The *Convention* declares an essential attribute of an international community to be where every human being is equally valued, and symbolically recognises people with disabilities as a distinct group in the human family, who are equal in dignity and rights with other members of the family. Despite being a crucial element of human rights treaties, symbolic function is largely overlooked in the scholarship.

We live in a highly uncertain, indeterminate and constantly evolving society, where social meanings are created by symbols.⁵⁶ By creating a legitimate version of a social world, symbols reproduce and reinforce the power relations that constitute the structure of a society.⁵⁷ Symbolic power is, according to Pierre Bourdieu, ‘a political power *par excellence*.’⁵⁸ In Nelson Goodman’s articulation also, it is a power of ‘the world-making.’⁵⁹ ‘No one can possess symbolic power as he or she pleases,’⁶⁰ notes Bourdieu, and argues that symbolic power rests on two conditions. First, as any form of performative discourse, symbolic power has to be based on social authority.⁶¹ Bourdieu writes:

[I]t is the power granted to those who have obtained sufficient recognition to be in a position to impose recognition. This is the power of constitution, a power to make a new group, through mobilization, or to make it exist by proxy, by speaking on its behalf as an authorized spokesperson, can be obtained only as the outcome of a long process of institutionalization.⁶²

Second, symbolic efficacy depends on the degree to which the vision proposed is founded in reality. ‘Obviously, the construction of groups cannot be a construction *ex nihilo*,’ writes Bourdieu, ‘it has all the more chance of succeeding the more it is founded in reality.’⁶³ He further elaborates:

In this sense, symbolic power is a power of consecration, the power to consecrate or to reveal things that are already there. Does this mean that it

⁵⁵ See discussion in Chapter Three.

⁵⁶ Pierre Bourdieu, ‘Social Space and Symbolic Power’ (1989) 7(1) *Sociological Theory* 14.

⁵⁷ Ibid 21.

⁵⁸ Ibid 23.

⁵⁹ Nelson Goodman, *Ways of Worldmaking* (Hackett Publishing, 1978) 7. According to Goodman, ‘world-making’ consists of separating and reuniting in carrying out a decomposition, an analysis, and a composition or synthesis, often by the use of labels.

⁶⁰ Bourdieu, above n 56, 23.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

does nothing? In fact, as a constellation which, according to Nelson Goodman (1978), begins to exist only when it is selected and designated as such, a group, a class, a gender, a region, or a nation begins to exist as such, for those who belong to it as well as for the others, only when it is distinguished, according to one principle or another, from other groups, that is, through knowledge and recognition.⁶⁴

Human rights treaties are powerful symbols. In the case of the *Disabilities Convention*, the injustice and negligence towards, and disadvantage of people with disabilities in most parts of the world is indisputable. In the last two decades, numerous global, regional and national reports consistently provide evidence of the dire situation of people with disabilities and remind about the need to make changes. As this research found, reminders can be important as coercion and persuasion. A former chair of the CRPD Committee, Ron McCallum, said that ‘the *Convention* is the fastest ratifying treaty in the UN history. I do not know the exact reason. But, to me, it is because governments suddenly realised that people with disabilities were forgotten.’⁶⁵

Human rights treaties in general possess an extremely potent form of symbolic power for two reasons. First, these treaties are rooted in the authority of the UN — an institution representing the international community. Ian Hurd reminds us that even the Security Council, which is seemingly the most ‘hard-core’ powerful institution of the UN, to a large extent runs on the basis of symbols.⁶⁶ Among various social symbols, a law is an especially powerful symbol due to its legitimacy and clarity. Van der Burg writes:

Authoritative texts, such as the Constitution or formal legislation, are particularly effective symbols in expressing certain values. They have been laid down by authorities which are supposed to represent us, the political community. As texts, they are usually carefully formulated and therefore express certain ideas and values more clearly than material symbols or stories would.⁶⁷

So do treaties in international law. These instruments are concluded in the highest form of legal normativity in international law, and therefore, their status endows an additional layer of symbolic power to human rights treaties. The IYDP affected Australian laws

⁶⁴ Ibid. See Goodman, above n 59.

⁶⁵ Interview with Ron McCallum, Emeritus Professor, The University of Sydney (former chair of the CRPD Committee) (Sydney, 26 March 2014).

⁶⁶ Ian Hurd, ‘Legitimacy, Power and the Symbolic Life of the UN Security Council’ (2002) 8 *Global Governance* 35.

⁶⁷ Van Der Burg, above n 52, 42.

and politics, but not Mongolia's. The Asian and Pacific Decade of Disabled Persons had some impact in Mongolia, but not much in Australia. In these two countries, the scope of galvanising impacts of the *Convention* has been unmatched by that of non-treaty instruments. In Australia, human rights treaties are weak legal instruments, unless they are incorporated into domestic law. The *Disabilities Convention* is a largely incomprehensible legal text for most Mongolian actors. Nevertheless, local actors in these countries turn to the *Convention* and leverage it in their political and social discourse. By so doing, they appeal to the law of the international community as more significant than the will of a single state. In the course of this research, I found that engagement with the UN, such as, taking part in reporting processes or, especially, appearing before its institutions — CRPD Committee and HRC — inspire, educate and connect local actors. Legitimacy and status are the nucleus of human rights treaties in regulating social life symbolically.

Van der Burg claims that a law as a symbol can have two functions, expressive and communicative.⁶⁸ The expressive function — the role of a law to proclaim the attributes of a particular constituency — has already been discussed. Additionally, as van der Burg writes, 'a law may explicitly create a normative framework, a vocabulary and a set of concepts to structure normative discussion as well as the institutions and procedures that promote further discussion, reflection and interpretation.'⁶⁹ It is the communicative function of a law that is connected with both the substantive and procedural sides of communication processes.⁷⁰ Human rights treaties possess strong expressive and communicative potential. They legitimise a particular version of political communities and express the fundamental values to which those constituencies are expected to adhere. Meantime, these treaties create the concepts, norms and international and domestic institutions through which communication occurs. In addition, the complex institutional architecture of the international human rights regime including the political, legal and administrative institutions of the UN, regional human rights mechanisms and national human rights systems (including most notably, the NHRIs) bears enormous communicative potential.

⁶⁸ Ibid 40-41.

⁶⁹ Ibid 49.

⁷⁰ Ibid.

The international human rights regime may appear instrumentally weak. Nonetheless, this research shows that the regime holds potent symbolic or political powers, which impact on domestic politics and societies regardless of legal incorporation of treaty norms. Through human rights treaties, the regime creates powerful symbols that recognise, legitimise and declare a certain ‘world view.’ The international human rights regime also holds repeated rituals that essentially channel the power of those symbols through the fabrics of societies. Hilary Charlesworth and Emma Larking demonstrate the regulatory potential and shortcomings of the UPR as a ritual of the international community.⁷¹ These scholars argue that, by enacting and celebrating recognition of a social consensus, the UPR can help to establish and entrench that consensus, and the formalised nature of the process emanates a power of social control.⁷² Charlesworth and Larking write:

Observers may register [the UPR’s] rituals as entertaining, foreign, intimidating, bizarre, or perhaps just enervating, but they may be less likely to understand them as forms of social control and instances of regulatory power.⁷³

Likewise, because of the subtlety of its effects, the symbolic power of human rights treaties is often unnoticed and even less understood. Their symbolic function (that is often called their ‘expressive function’) can also carry negative connotations such as ‘cheap talk’ or ‘mere declaration.’ This research tells the story of how the *Disabilities Convention* impacts on the very fabric of societies through its symbolic power. It is essentially a political power — a power of self-transformation.

I argued in Chapter Four that, apart from its instrumental purpose, the *Disabilities Convention* was created for a symbolic purpose — that is to recognise and declare the status of people with disabilities as full members of the community of rights holders. I also claimed that the fact that there is a treaty protecting the rights of people with disabilities is more important for some people than what it actually prescribes. Few Australian actors who participated in the *Convention*’s drafting were prepared to

⁷¹ Hilary Charlesworth and Emma Larking, *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press, 2014).

⁷² Ibid 9.

⁷³ Ibid 10.

identify that the treaty was essentially intended for symbolic functions. Rosemary Kayess said:

Proclaiming the rights of people with disabilities by international law became symbolic validation. International law is not good as domestic law, where it is not incorporated into domestic law. The *DDA* can potentially create a lot more movement than the *CRPD*. In its enforcement, international treaties are symbolic. They are moral statements seeking to persuade the states.⁷⁴

This research demonstrates that, in the two countries studied, the independent effects of the *Disabilities Convention* have been more significant than the direct implementation of its norms. If the outcomes of the *Convention* in Australia and Mongolia are judged on the basis of its symbolic purposes, the *Convention* is functioning exactly as intended. Griffiths writes:

Just because an effect [of a law] is independent of conforming behaviour does not mean that it is not perfectly real. It is sociologically silly to describe a law as ineffective just because it is not obeyed. I do not know how one would measure such things, but I see no reason to suppose that the effects one can produce by appearing to be something are always or even usually less than what one can produce by telling others how to behave. There is, in short, no reason to doubt the existence of independent effects, but we know even less about them than we do about direct and indirect effects.⁷⁵

Having seen the significant non-legal impacts that the *Convention* produces in Australia and Mongolia, it is also sociologically folly for me to conclude the *Disabilities Convention* has no impact in these countries, simply because the recent legal and policy reforms of the two countries were not the direct implementation of the *Convention*. Instrumentalist scholarship decries weak enforcement of the human rights regime, yet fails to notice its promising political power. To understand the symbolic power of human rights treaties, the scholarship must retreat from a simplistic understanding, that is: treaties regulate the conduct of states by imposing clearly stipulated legal obligations. This thesis has argued that such legalistic views cannot adequately capture the outcome of human rights treaties, which can effect social actions through their existence and, more precisely, through their core values and symbolic status as international law.

⁷⁴ Interview with Rosemary Kayess, Director of Human Rights and Disability Project, Australian Human Rights Centre at the Faculty of Law, University of New South Wales (Sydney, 26 March 2014).

⁷⁵ Griffiths, above n 44, 355.

V RETHINKING HUMAN RIGHTS TREATY IMPLEMENTATION

Having argued that the instrumentalist vision is half-empty, I advance my claim in this section and urge the human rights scholarship and practice to better account the underlying philosophy or the values of the treaties. A treaty implementation strategy, which overly focused on norm incorporation and enforcement, quite often neglects the values of human rights treaties. Yet, these treaties not only prescribe the obligations of conduct, but they require such actions to be taken from a particular philosophical point of view. Building ramps and improving social services are not adequate for implementing the *Disabilities Convention*. The human rights approach to disability, which I attempted to explicate in section III(B) of Chapter Three, requires that ramps must be built and services must be improved on the basis of and for the purpose of full recognition of inherent dignity, equality and human rights of people with disabilities. These actions should not be a matter of benevolence or modernity, but they should be a matter of a state responsibility.

This research indicates that the *Disabilities Convention*, in combination with ensuing domestic actions, has had some cultural impact in the two countries. Nevertheless, the cultural effects of the *Convention* have been selective and incidental. Among its moral values, some ideas, especially those resonating to experiences and/or the prevailing cultural norms of a particular context, have been picked up by local actors and have grown on that soil. As discussed, the recognition of personal autonomy of people with disabilities was commonplace in Australia, whereas in Mongolia people become more aware of the connection between disability and social environment.

This research has provided examples of where the efforts to implement the *Convention* contravenes its values. The Mongolian government commemorates the day that it acceded to the *Convention*, organising an annual public awareness campaign and, in 2013, the day was observed under the theme of ‘*Prevention from Disability*.’ Moreover, the plan to implement the *Disabilities Convention* in 2013-16 encompassed a set of activities designed to promote awareness on preventing from disability. The Mongolian government reported these steps to the CRPD Committee, which, following the suit of international disability instruments that have retreated from the concepts of prevention and rehabilitation, is generally critical of these concepts. Probably surprising to some in

the Mongolian delegation, the CRPD Committee condemned Mongolia for these activities as:

The Committee is concerned about negative attitudes towards persons with disabilities in the State party, as manifested in everyday language, the media and events such as “disability prevention day”, which represents a concept that is contrary to the principles of the *Convention*.⁷⁶

The NDIS promises more a dignified life for thousands of Australians with severe and profound disability. However, it is important to bear in mind that the NDIS is an insurance policy, which covers eligible people from the consequences of disability and is partially funded through an insurance premium. Neither the underlying assumption of the NDIS seeing disability as risk against nor its contentious title as DisabilityCare Australia was questioned by the CRPD Committee, although it hesitates using the word ‘care’, because of its paternalistic impulse. The concluding observations on Australia states that:

The Committee commends the State party for introducing DisabilityCare Australia, a national scheme of self-directed disability support, which includes persons in need of intensive support.⁷⁷

Via webcast, I watched closely the CRPD Committee dialogue held with the Australian and Mongolian governments regarding their initial reports on the implementation of the *Disabilities Convention*. In each dialogue, which took about six to seven hours over two days, questions touching the *Convention*’s values were asked very rarely. Such questions have been asked of Australia twice on the same issue: *how can the Australian government change the underlying medical approach of its disability laws into a human rights approach?* The question seems to have greatly frustrated some delegations, probably because they did not understand clearly what the Committee members meant by the human rights approach to disability.

The Committee members have asked only three such questions of the Mongolian delegation.⁷⁸ For example, pointing out Asian cultural contexts, where the sense of

⁷⁶ CRPD Concluding observations on Mongolia 2015 para 14.

⁷⁷ CRPD Concluding Observations on Australia 2013 para 6.

⁷⁸ The other two questions involved rehabilitation of people with disabilities and prevention of disability. Committee member László Lovaszy clarified the purpose of the Disability Prevention Day, which was approved by the Government Resolution No 281 of 2013. However, the translator could not convey the meaning of the question. A head of the Mongolian delegation responded very generally, saying ‘we take

personal independence could be different from that of Western countries, Committee expert Munthian Buntan asked: *how is Mongolia going to transform the supervisory role of the extended families to a supportive or assistive role?* Unfortunately, the question was misinterpreted and the Mongolian delegation responded to it by simply repeating its domestic laws. Clearly, in such a dialogue, a translator exercised significant power in shaping the discussion. What is important to highlight in this case is that a dialogue like this requires not just linguistic translation, but also philosophical comprehension.

Any ideology evolves over time, and is subject to multiple interpretations at the same time. It is hard even for the CRPD Committee members to come up with a unified definition of the human rights approach to disability. In fact, a shift in the understanding of the human rights approach can be seen from writings of prominent experts. The earlier guidelines on the *Convention* seemingly avoided from acknowledging the implications of impairment on an individual, siding with the claims of social model of disability.⁷⁹ Contrastingly, some recent works suggest a preference of a more balanced approach on this issue, at least among the Committee members.⁸⁰ Notwithstanding the difficulties to define an idea, contemplating seriously and discussing widely about the underlying philosophies of human rights treaties as they are understood and applied in a certain span of time will help us to better understand ourselves, our society and our worldviews.

people first.’ Another Committee member, whom I was not able to identify from the webcast, asked why Mongolian disability policy has such a strong focus on rehabilitation. She reminded that rehabilitation of people with disabilities, although of assistance, comes at a price and asked ‘how Mongolia plans to mainstream people with disabilities?’

⁷⁹ See, eg, United Nations Office of the High Commissioner for Human Rights, ‘Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors, Professional Training Series No 17’ (2010) 7-11, 15-16

<http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf>. The manual seemingly implies that the *Convention*’s approach to people with disabilities aligns with the human rights approach to disability. See also Marianne Schulze, ‘Understanding the UN Convention on the Rights of Persons with Disabilities: A Handbook on the Human Rights of Persons with Disabilities’ (Handicap International, 2010) 15-16 <http://www.hiproweb.org/uploads/tx_hidrtdocs/HICRPDManual2010.pdf>.

⁸⁰ Asia Pacific Forum of National Human Rights Institutions ‘Human Rights and Disability: A Manual for National Human Rights Institutions’ (2017) 10-15 <<http://www.asiapacificforum.net/resources/human-rights-and-disability-manual-nhris/>>. Drawing on a paper by Theresia Degener, this manual distinguishes between the social model and the human rights model, providing six distinctions between the two models. For example, it states that a distinction of the human rights model from the social model involves ‘an honest acknowledgment of the difference—and sometimes the pain—associated with impairment.’ Degener was elected as the chairperson of the UN Committee on the Rights of Persons with Disabilities on 20 March 2017 until December 2018.

Given that supporting people with disabilities is generally accepted, and given also that the *Convention* has had strong galvanising effects, it seems that the cultural effects could have been deeper in these two countries if implementation strategies had taken better account of the *Convention*'s philosophy. Alongside norm enforcement and legal incorporation, an important strategy of treaty implementation should be dialogue and debate about their moral values. John Tobin has said that:

Most advocates may say that 'we must have a law that reflects *CRC* or *CRPD* norms' etc. But I think it is problematic, because international human rights law itself is incompletely theorised and incoherent. Strict importation of international treaty into domestic law is a complex process. Even if we have gone this way, it is doubtful that it transports the values. However, if the treaty values become part of the culture — preclude the idea of having legal protection — these values can create change.⁸¹

This research suggests that increased attention and dialogue on treaty values will potentially improve their domestic effects. The human rights approach to disability as proclaimed by the *Disabilities Convention* in the domain of international law galvanised local actors and, through that, the *Convention* affected the social fabric of the two countries. This research also found that the international human rights regime has significant expressive and communicative potentials to channel cultural impacts of the treaties. The two countries studied, despite their vast differences in history, government structures, basic rules of legal systems, nature of domestic politics, economic development and culture, are relatively open to global affairs and pertain institutional infrastructures such as national human rights institutions and DPOs, through which the global ideas can penetrate to domestic spheres. While global circulation of ideas does not depend too much on technicalities of international law, formal ratification of the *Disabilities Convention* has certainly made the global and local interactions more frequent and intentional. At the same time, it is important to note that certain elements of the human rights approach to disability have already been in place in laws and social consciousness of the two countries, a greater or lesser degree.

Human rights treaties create international legal obligations, which consenting states parties pledge to implement. Simultaneously, these treaties are embodiments of ideas. They tell us how we decided to see ourselves and the society around us. From this

⁸¹ Interview with John Tobin, Professor, The University of Melbourne (Melbourne, 27 February 2014).

perspective, human rights treaties can be seen as phases in the moral reflection process of humanity. Chapter Four discussed how international disability instruments reflected and also deflected the shifting understandings of disability and legal entitlements of people with disabilities. One instrument was crafted, engraining probably the most progressive ideas on the subject matter agreed at its time. In turn, such an instrument affected the social consciousness in various ways. By reading the international disability instruments in their historic progression, I was able to see a recursive process occurring between the instruments and the social consciousness. In their core, the international human rights treaties are designed to signify, validate and declare moral propositions that are believed to have agreed universally, but not so much to enforce a conduct of states parties. Human rights treaties thus are undeniably cultural processes. We may enforce certain conduct, but enforcing a cultural change would be difficult. Therefore, the increased dialogue on the values of human rights treaties is not only a promising strategy to improve their domestic impacts, but also it is an apt strategy. Moreover, this strategy could lead to a better treaty regime that is responsive to different domestic contexts.

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I. Thesis

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J. Interviews

1. Australia

Confidential Interview No 1 (Sydney, 27 March 2014) [The interviewee works for the Secretariat to the Disability Council NSW.]

Confidential Interview No 2 (Sydney, 27 March 2014) [The interviewee is in charge of advising for disability law reforms of the NSW government. She/he provides training for local government officials on the *Disabilities Convention*.]

Confidential Interview No 3 (Melbourne, 25 February 2014) [The interviewee holds a senior position at the VEOHRC, and works closely with Disability Reference Group.]

Confidential Interview No 4 (Melbourne, 28 February 2014) [The interviewee works for the Victorian government and is responsible for formulating disability policies and facilitating policy implementation.]

Interview with Ben Schokman, Director of Legal Advocacy, Human Rights Law Centre (Melbourne, 20 February 2014)

Interview with Brian Burdekin, Visiting Professor, Raoul Wallenberg Institute, Lund University (Australia's first federal Human Rights Commissioner) (Sydney, 26 March 2014)

Interview with Chris Sidoti, Senior Consultant, Asia Pacific Forum of National Human Rights Institutions (former Disability Discrimination Commissioner of the AHRC) (18 March 2014)

Interview with Damian Griffiths, Executive Director, First People's Disability Network (Sydney, 28 March 2014)

Interview with Dinesh Wadiwel, Senior Lecturer and Director of Masters of Human Rights, Faculty of Arts and Social Sciences (former Executive Director of National Ethnic Disability Alliance) (Sydney, 20 March 2014)

Interview with Frank Hall-Bentick, Board Member, Australian Federation of Disability Organisations (Melbourne, 25 February 2014)

Interview with Eleanore Fritze, Senior Lawyer, Mental Health and Disability Advocacy, Victoria Legal Aid (Melbourne, 25 February 2014)

Interview with Gerard Goggin, Professor Department of Media and Communications, University of Sydney (Sydney, 18 March 2014)

Interview with Graeme Innes, Disability Discrimination Commissioner, Australian Human Rights Commission (Sydney, 20 March 2014, updated via telephone on 25 July 2016)

Interview with Jan Ashford, Chief Executive Officer, Communication Rights Australia (Melbourne, 27 February 2014)

Interview with Janine Cootes, Executive Officer, Intellectual Disability Rights Service (Sydney, 19 March 2014)

Interview with Joel Townsend, Program Manager, Migration and Social Inclusion Programs, Victoria Legal Aid (Melbourne, 25 February 2014)

Interview with Kevin Stone, Executive Officer, The Victorian League for Individuals with a Disability (Melbourne, 26 February 2014)

Interview with Lauren Henley, National Policy Officer, Blind Citizens Australia (Melbourne, 24 February 2014)

Interview with Lee Ann Bassar, Reader and Associate Professor, La Trobe Law School (Melbourne, 20 February 2014)

Interview with Margaret Fahy, Legal Advisor, Anti-Discrimination Board of NSW (Sydney, 27 March 2014)

Interview with Ngila Baven, Human Rights Advisor, People with Disabilities Australia Inc. (Sydney, 27 March 2014)

Interview with Rosemary Kayess, Director of Human Rights and Disability Project, the Australian Human Rights Centre at the Faculty of Law, University of New South Wales (Sydney, 26 March 2014).

Interview with Stephanie Gotlib, Chief Executive Officer, Children and Young People with Disability Australia (Melbourne, 24 February 2014)

2. Mongolia

Confidential Interview No 1 (Ulaanbaatar, 30 May 2013) [The interviewee holds a senior position with direct involvement with the Disabilities Division at the Ministry of Population Development and Social Protection]

Confidential Interview No 2 (Ulaanbaatar, 3 June 2013) [The interviewee works for the Disabilities Division of the Ministry of Population Development and Social Protection]

Confidential Interview No 3 (Ulaanbaatar, 14 June 2013) [The interviewee holds a senior position at the Ministry of Foreign Affairs, supervising ratification and implementation of multilateral international treaties of Mongolia]

Interview with Altantuya Batdorj, Executive Director, Amnesty International Mongolia (Ulaanbaatar, 2 June 2013)

Interview with Avirmed Yamkhin, Head, Aivuun NGO (Ulaanbaatar, 11 June 2013)

Interview with Baatarjav Dambadondog, President, United Association of Organisations of People with Disabilities (Ulaanbaatar, 17 June 2013)

Interview with Badamkhand Dolgorsuren, Director, *Salkhich Shuvuu* NGO (Ulaanbaatar, 30 May 2013)

Interview with Batdulam Tumenbayar, Head, Division for Development of People with Disabilities, Ministry of Population Development and Social Protection (Ulaanbaatar, 3 June 2013)

Interview with Chuluundolgor Bat, Head, National Association of Wheelchair Users (Ulaanbaatar, 7 June 2013)

Interview with Gerel Dondov, President, National Association of Blind Citizens (Ulaanbaatar, 04 June 2013, updated via Skype on 12 June 2015)

Interview with Gerelmaa Amgaabazar, Program Manager, Open Society Forum (Ulaanbaatar, 20 June 2013)

Interview with Gunjilmaa Batsuuri, Director, Business Incubator Centre (Ulaanbaatar, 17 June 2013)

Interview with Khishigsaikhan Batchuluun, Program Manager, Open Society Forum (Ulaanbaatar, 5 June 2013)

Interview with Narantuya Badarch, Director, National Centre for Rehabilitation and Development of People with Disabilities (Ulaanbaatar, 3 June 2013)

Interview with Nasandelger Zandankhuu, Program Manager, Merci Corps Mongolia (Ulaanbaatar, 12 June 2013)

Interview with Oyun Sanjaasuren, Member of Parliament, Minister for Environment and Green Development (Ulaanbaatar, 18 June 2013)

Interview with Oyunchimeg Purev, Commissioner, National Human Rights Commission of Mongolia (Ulaanbaatar, 31 May 2013)

Interview with Oyunbaatar Tsedev, President, DPO Federation (Ulaanbaatar, 27 May 2013)

Interview with Selenge Sambuu, Director, Association of Parents with Differently-abled Children (Ulaanbaatar, 29 June 2013)

Interview with Tsedelbal Togoogurjav, President, National Association of Organisations of People with Hearing Impairments (Ulaanbaatar, 31 May 2013)

Interview with Tulgamaa Damdinsuren, Resident Representative to Mongolia, Amici di Raoul Follereau Association (Ulaanbaatar, 28 May 2013, updated via Skype on 14 January 2015, updated via telephone on 02 February 2017)

Interview with Undrakhbayar Chuluundavaa, Director, Universal Progress Centre NGO (Ulaanbaatar, 11 June 2013, updated via Skype on 16 May 2015)

Interview with Urantsooj Gombosuren, Head, Human Rights and Development Centre (Ulaanbaatar, 12 June 2013)

Interview with Uyanga Enkhbold, Officer, Embassy of the United States of America in Mongolia (Ulaanbaatar, 18 June 2013)

K. Informal conversations

Informal conversation with Craig Wallace, President, People with Disability Australia (Canberra, 10 December 2013)

Informal conversation with Peter Drahos, Professor, School of Regulation and Global Governance (RegNet), College of Asia and the Pacific, the Australian National University (Canberra, 7 March 2016)

APPENDIX

Indicative list of interview questions

The following questions informed the semi-structured interviews that I undertook with local actors. I was guided by the way that each interview unfolded. However, depending on circumstances, I attempted to cover all questions at some point of the interviews.

A. Questions to civil society actors, including disability activists and academics:

- In your opinion, has the *Disabilities Convention* made any difference to this country? If it has, what would be the most important impacts of the *Convention*?
- How do you think such changes impacted on the lives of people with disabilities? Can you identify any concrete example?
- What did you expect from your government's ratification of the *Disabilities Convention*? Do you think that your expectations have been met or can be met in the future?
- Are provisions of the *Disabilities Convention* clearly comprehensible to you? Can you name any provision in the treaty that seems not applicable to the context of this country?
- The Convention says that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'. How do you conceive of this concept of disability? Do you think this understanding of disability is relevant to the context of this country? What does the human rights approach to disability mean to you?
- Do you think what your government is doing in the area of disability in the recent years are consistent with the human rights approach to disability? Can you identify any example of your government action that is inconsistent with the human rights approach to disability? Why did it happen?
- How has the *Disabilities Convention* impacted on DPOs of this country?
 - What are the priorities of your organisation?
 - What are the strategies of your organisation to fulfil its mission?
 - What are your organisation's networks?
 - How do you collaborate with other DPOs and other human rights NGOs?
 - How do you collaborate with the government?
 - How do you collaborate with international organisations, including the UN?
- What would be the two most important measures to improve the implementation of the *Disabilities Convention* in your country?

B. Additional questions to government officials:

- In your opinion, to what extent, has the ratification of the *Disabilities Convention* influenced government policies? What are the major changes in disability policies since the *Convention*'s ratification?
- Did you see any difference that the *Convention*'s ratification impacted on DPOs?
- How do you understand the human rights approach to disability embedded in the *Disabilities Convention*? Do you think your government's policies are consistent with the human rights approach to disability? Can you give a concrete example of such consistency or inconsistency?
- How do you use the *Disabilities Convention* in your work? Was the *Convention* of any help?